HISTORICAL INTRODUCTION

TO THE

ROMAN LAW

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PREFACE.

THE purpose of this book is modest and practical. It is to present a short view of the constitutional law of Rome, and of the modes in which the laws were made which ultimately found their way into Justinian's *Corpus Juris.*

In a general course upon the Roman Law, I do not find it profitable to devote any large proportion of the lectures to its history. There are two methods of teaching the Roman Law, both of which have distinguished supporters. One is to present it as a thing apart, without reference to the present. The student is left to make any applications which he may see fit. The other method is to show the way in which the Roman Law has grown into the modern Civil Law. In a country like England the former method is the more natural, because the Roman Law and the English Law are essentially different systems. In a country of the Civil Law, like the Province of Quebec, the latter method is, I think, the more useful. Between the ancient and the modern law, there is no breach of continuity; the one has grown out of the other. Whichever method we adopt, the law cannot be made intelligible to the student, unless he has some knowledge of the history.

There is an astonishing output of histories of the Roman Law, especially in Germany. The *Römische Rechtsgeschichte* of Moritz Voigt was only completed last year, and the important work of Karlowa is still in course of publication. But such works are on a scale altogether unsuited to the ordinary student. Even the valuable work of Professor Muirhead is much too detailed for the student who has to obtain in one year the elements of the Roman Law itself, as well as of its history. I hope, therefore, that there may be room for a short and simple book like the present. Chapters I. and II. have already appeared as separate essays in the *Revue Légale* of Montreal and the *Juridical Review* of Edinburgh respectively.

McGill University,
May, 1903.

NOTE ON THE BIBLIOGRAPHY.

In writing this sketch I have consulted many authorities. Among the writers to whom I am most indebted are :—

Karlowa, *Römische Rechtsgeschichte* (Leipzig. Still unfinished. The last *Abteilung* is dated 1901).

Schulin, *Lehrbuch der Geschichte des Römischen Rechts* (Stuttgart, 1889).

Cuq, *Les Institutions Juridiques* (Paris, 1891).

Girard, *Manuel Élémentaire de Droit Romain* (second edition, Paris, 1898).

Bruns, *Geschichte und Quellen des Römischen Rechts*, revised and brought down to date by Pernice, in Holtzendorff, *Encyclopädie der Rechtswissenschaft* (fifth edition, Leipzig, 1889). I have cited this, shortly, as *Bruns*.

Muirhead, *Roman Law* (second edition, London, 1899).

Krüger, *Geschichte der Quellen und Litteratur des Römischen Rechts* (Leipzig, 1888).

Post, *Grundriss der Ethnologischen Jurisprudenz* (2 vols., Oldenburg, 1894).

Roby, *Introduction to the Digest* (Cambridge, 1884).

Padelletti, *Storia del diritto romano, di G. Padelletti, con note di Pietro Cogliolo* (Firenze, 1886).

I have not made much use of Voigt's *Römische Rechtsgeschichte;* and Mr. Roby's new work, *Roman Law in the time of Cicero, and of the Antonines*, has appeared too late for me to consult it.

PERIODS IN THE HISTORY.

THE history of the law stretches over thirteen hundred years—*i.e.*, from 753 B.C., the assumed date of the foundation of the City, to 565 A.D., the date of Justinian's death. Most writers find it convenient to break up the history into shorter periods. Several divisions have been suggested. To my mind the most natural is the following :—

First Period—	
The Kings, . .	753–509 B.C.
Second Period—	
The Republic, . .	509 B.C.–27 B.C.
Third Period—	
The Constitutional Monarchy or Principate, . .	27 B.C.–284 A.D.
Fourth Period—	
Absolute Monarchy, .	284 A.D.–565 A.D.—*i.e.*, from the commencement of the reign of Diocletian to the death of Justinian.

These divisions are adopted by many of the best writers, as—*e.g.*, by Bruns in his masterly outline entitled *Geschichte und Quellen des Römischen Rechts* (in Holtzendorff's *Encyclopädie*), and by Girard, whose *Manuel Élémentaire de Droit Romain* (second edition, Paris, 1898), is in many respects the most complete of the recent text-books. Karlowa, whose very elaborate history of the Roman law is not yet finished, has the same divisions, except that he reckons the Kings and the Republic together as forming one period.[1]

[1] See for some other divisions Prof. Goudy's note in the 2nd edition of Muirhead's Roman Law, at p. 421.

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ROMAN LAW.

CHAPTER I.

The Value of the Roman Law and the Causes of its Success.

With the exception of the Bible there is no book which has so profoundly affected western civilisation as the Corpus Juris. It has given to the modern law much of its substance, and a form, an arrangement and a method which will last as long as society itself. It has become, as Ihering says, an element of our civilisation.[1] The Roman Law is the greatest single legacy which the ancient world has bequeathed to the modern. In Art, in Literature, in Philosophy, in Science, our debt to the ancient civilisation is incalculable. The intellectual ferment out of which progress is born, the restless striving after something better which is the mark of the western world, was the gift of Greece. She is the spiritual mother of Europe, and through Europe of America. But for the brilliant genius of that extraordinary people it seems not impossible that Europe might have remained no less indissolubly bound by the chains of custom than Asia. But in Art, in Literature, in Philosophy, and most of all in the Physical Sciences, there is a great breach of continuity between the ancient and the modern world. It would not be correct to say

[1] *Esprit du Droit Romain*, i. 14.

that our Art or our Philosophy or our Science, is ancient art or ancient philosophy or ancient science, modified and adapted to a new environment. But it is not incorrect to say that our Law—the modern civil law—is the Roman Law, so modified and adapted.

The history of the Civil Law might be compared with the course of a large river which after flowing for a long distance breaks up into several channels. Each of these new channels receives affluents great and small, and each of them becomes a river with a character of its own. But if we trace any one of them back, we ultimately come to the parent stream. So, if we trace back the French, or the German, or the Italian, or the Roman-Dutch law, we come to the old Roman law out of which they all flowed.

In the countries which derive their law from the Roman innumerable changes have been made in detail. Some of these have been made openly by statute, others have been introduced stealthily by judges or commentators. Sometimes a whole stream of new law has flowed in—*e.g.*, there was a time when the feudal system almost drowned the Roman law in some countries. But feudalism in its extreme form could not last. And the French law at the Revolution swept away many of the feudal rules—*e.g.*, the rule that a son excludes daughters in succession to a fief and that the eldest son excludes the younger.[1] In this as in some other questions of great importance the modern French law is nearer to the Roman than the old French law was. And, notwithstanding all the changes which have been made in one country and another, the essential unity of the civil law has not been lost. The differences are differences of detail; the principle, the methods and the terminology are the same. A French lawyer who began to practise in Italy, or a Quebec lawyer

[1] See, for distinctions, Glasson; *Histoire du Droit et des Institutions de la France*, 7, 430, 466.

who transferred himself to New Orleans would have to learn something of the statute law of his new home and to inquire the views of the Courts as to certain moot questions of the civil law which for centuries have agitated the breasts of the commentators. But his main stock of legal knowledge would not need to be renewed, the technical phraseology would be the same, and the legal method which he had painfully learned would stand him in as good stead in his new country as in his old one.

In Lower Canada, we may get a rough notion of the extent to which our Civil Code is based on the Roman law by turning over an edition, which gives the Commissioners' references to authorities. If you look at any Book of the Code, except Book IV. which deals with Commercial Law, you will find continual references to the Roman Law. In some parts of Book I., which deals with persons, they are less frequent. One would hardly expect the formalities of marriage or the official rules as to acts of civil status to be those of the Roman Empire.

And the profound change in the character of our society since the sixth century has brought with it corresponding changes in the law of persons. The patriarchal household in which the *paterfamilias* rules as king and priest has long since passed away. The Roman law of persons has its centre in that singular and primitive institution and its fall has made obsolete a great part of the old law. Again the institution of slavery which affected most intimately every part of the social organism at Rome has, happily, disappeared. And, still again the influence of the Church has altered the law of marriage and led to far greater regard for the marriage tie. So that in the law of persons we shall not be surprised to find that a new order has taken the place of the old. Still the new order has grown out of the old and is a development of it. The very word "person" in its legal sense is Roman and we owe to the Roman law the discussions as to

the requisites of personality, and the fruitful distinction between physical and jural persons. The law of Tutory is also mainly Roman. Our law of persons like our law of obligations is built upon the Roman, but as to persons the modifications have been much greater. But frequent as are the references of the Commissioners to the Roman law, these, notwithstanding, afford only a very rude test of the indebtedness of our code to the law of Rome. For the commissioners often content themselves with citing Domat, Ricard, Pothier, or other old French writers. If we turn to these we find that they support every argument by Roman authority. To a very considerable extent indeed our Civil Code of Lower Canada simply reproduces in an abridged and abstract form the conclusions reached by the Roman lawyers fifteen or sixteen hundred years ago.

Sir Henry Maine says that the Code Napoléon "may be described without great inaccuracy as a compendium of the rules of Roman law then practised in France, cleared of all feudal admixture, such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier."[1] The description applies equally to our Civil Code. It is very significant of the permanent value of the Roman law that two great codes, one drawn up at the beginning and one at the end of this century should consist to so great an extent of Roman law. The new code for the German Empire which came into effect on 1st January, 1900, is full of Roman law. And if the whole code may be roughly called a compendium or abstract of the rules of Roman law, especially is this the case as to the parts of the code which deal with obligations and with some of the special contracts, such as sale, lease, mandate and deposit. This is almost all pure Roman law. I do not mean that no changes have been made, but the changes are

[1] *Village Communities, &c.*, p. 357.

trifling when compared with the mass of rules which have remained unaltered. The *Coutume de Paris*, upon which our old Civil Law is based, contains nothing about these subjects. That *coutume* like the other *coutumes* of the *ancien régime* in France had not any general theory of obligations nor any special theory as to particular contracts. Some of them had a few peculiar rules as to the sale of certain kinds of property or local customs as to lease. But even these trifling exceptions are not found in the *Coutume de Paris*. The law of obligations and contracts, the very centre and kernel of the whole law was left in France to be regulated by the Roman law. The law of servitudes, of hypothec and pledge, and of suretyship is also almost wholly Roman. Pothier, whom the French codifiers took as their guide when they drew up the Code Napoléon, and whom our commissioners cite at every turn, is in fact one of the most eminent expounders of the Roman law. The merest glance at his great work on obligations is enough to convince one of this. There is hardly a paragraph which is not supported by a citation from the *Digest*. A man who spent twelve years of his life in arranging the texts of the Roman law — and Pothier's edition of the Roman Pandects cost him no less—was, we may be sure, convinced of their permanent value to the world. A large part of the body of our present law is still, to a great extent, Roman law. The divisions of the field, the framework, the language are still Roman. The old French authorities — *e.g.*, Du Moulin, Cujas, Doneau, Domat, Pothier are before everything great students of the Roman law. They are saturated with it. They speak its language, breathe its breath and look up to Papinian and Ulpian as their great masters. It is, however, Roman law modified and adapted to suit a different state of society. In this work of stripping the Roman law of its technicalities and fitting it to be the law of modern France the great names

are Domat and Pothier. It is from them and not directly from Justinian's Corpus that the compilers of the Code Napoléon drew.

Our law of obligations is the Roman law adapted by Domat and Pothier.

Nor is the belief in the excellence and value of the Roman law by any means confined to the ancients. Laurent—*e.g.*, says that for the modern lawyer no study is more necessary. He says that the works of the Roman lawyers are still the masterpieces of the art and have no more been surpassed than Plato has been surpassed as a philosopher or Demosthenes as an orator.[1] If we were not so familiar with it it would fill us with amazement that the Courts of Quebec and Cape Colony, of France and of Germany should still practise and enforce a mass of legal rules formulated at Rome perhaps two thousand years ago. Why did the young countries of Western Europe adopt the Roman law instead of making a system of their own? The Roman Empire had been broken into fragments five hundred years before France and Germany and Italy began to emerge from the darkness and to assume distinct shapes as nations. Why should these young nations with one accord have said, "we will be governed by the laws of Rome except in so far as we may decide to make changes?" It is a striking fact that in a considerable part of Europe the Roman law was actually a binding authority almost down to our own time. About the twelfth century France became divided into two zones[2] called the *pays coutumiers* and the *pays de droit écrit.* The line between them coincided pretty exactly with the linguistic division. In the *pays coutumiers* the language was the *Langue d'oil* which developed into modern French. In the *pays de droit écrit* it was the *Langue d'oc* which became

[1] *Principes*, 1, 40.

[2] Glasson, *Histoire du Droit et des Institutions de la France*, 4, 18; where a full enumeration is given of the *pays de droit écrit.* They formed about one-third of France.

the Provencal still spoken in southern France. The south, including Acquitaine, Gascony, Navarre, Provence and some other small districts, was more thoroughly Romanised than the north had ever been. Great numbers of Romans had settled there. Nîmes, Arles and other cities had been centres of Roman art and culture. The Roman law had never been forgotten. During the dark period between the sixth and eleventh centuries the Roman texts were almost if not quite unknown in the south of France. But so far as possible the people of the south followed the Roman law as it was known by tradition. When the study of the Roman law was revived by the glossarists, the *Midi* was like a country which having lost its codes for five hundred years, and in the interval practised what it could remember of them, has the good luck to find them again.[1] Now in all this country the *droit écrit* —the old Roman law—was binding. The Roman law was the common or general law of the land. They treated the compilations of Justinian as we treat the Revised Statutes. And upon the same principle the latest of Justinian's provisions upon any point was given effect to. So the Code prevailed over the Digest in cases of conflict, and the Novels over the Code. If in any district there was a fixed custom upon any matter the Courts would follow it in preference to the Roman law, and many of the towns had charters by which the Roman law was modified in some points within the municipality. But the main body of the law was the Roman law pure and simple. The most important matter not governed by Roman law was the law concerning the rights of seigneurs, the droit féodal.

In the north the Germanic influences were stronger, and every district was governed as to certain matters mainly by *coutumes*. So—*e.g.*, the property relations of husband and wife were those of the Old Germanic community of goods

[1] Esmein, *Histoire du Droit Français*, 711.

instead of the dotal system, which the *pays de droit écrit* had retained from Roman days. When the custom was silent upon the point in dispute, what law was to be appealed to? This is still a moot point. Some say it was to the custom of Paris, and, failing that, to the Roman law, but only as *ratio scripta*. Others say that if the *coutume* was silent the judge had no choice but to follow the Roman law. But as regards obligations and contracts there was no difference of opinion. There the principles of the Roman law were to rule in the north as well as in the south.

In Germany, also, a large part of the country was governed by Roman law until 1st January, 1900. The so-called Territory of the Law of the Pandects, including Holstein, Würtemberg, and Bavaria, recognised the Roman law as actually binding on the Courts, except where expressly altered by local laws. The new German Code for the whole Empire came into force in 1900.

So that not only is the law of Western Europe founded upon the Roman law, but to a very great extent it actually is the Roman law. And in part of Europe the Emperor Justinian's compilations were as binding as if the local legislature had re-enacted them.

What Shelley said of Greece as the mother of liberty and art, we may apply to Rome as the great lawgiver of the nations :—

> "Her citizens, imperial spirits,
> Rule the present from the past,
> On all this world of men inherits
> Their seal is set."

To a great extent Europe is still ruled by the Roman law. So are countries so remote from each other geographically, and so different in every respect, as the Island of Ceylon, the Province of Quebec, and the State of Louisiana. Why has so large a part of the world been content to take the Roman law as the basis of its own system, and in many branches to

leave it on the whole very much as it was in the sixth century?

The extraordinary success of the Roman law is due, like most successes, mainly to merit, but partly to opportunity. No other nation of antiquity built up a legal system which, except in the unchanging East, would have had the least chance of surviving. Four causes among others made this possible for the Roman law:—

1. Its universal character.
2. Its fulness and refinement.
3. The prestige of Rome.
4. The support of the Church.

1. The great problem which the Roman lawyers had to solve was how to make their ancient local law applicable to a great empire. They had to examine what customs and rules were local and too peculiar to be extended, and to substitute for these, so far as possible, rules which no reasonable and fair-minded man could object to be bound by. They had to take the rude laws and customs which the Romans had inherited from their primitive ancestors, and to create out of them law which should be applied throughout the civilised world. It was a great task, and it was performed with wonderful success.

Rome had, for example, very ancient formal rules about sale. But these were not suitable for the Roman Empire or for the Roman to use in dealing with the foreign trader. They must, therefore, lay down rules as to sale which should have no local colour in them, which should be suitable for every trader to whatever country he belonged. All the law of obligations and contracts was in this way denationalised. This process was, for political reasons, so important for Rome, that her greatest statesmen gave much of their time to it. In no other country, ancient or modern, is the law so largely the work of the greatest men of the time. Papinian,

Ulpian, and Paul, the main contributors to the Digest, all held in their day the post of prætorian præfect, an official who at that time combined pretty much the powers of prime minister and commander-in-chief. Like an oriental vizier, he was the *alter ego* of the Emperor, and, in many cases, really carried on the work of government.[1] Men in such a position, and what is more, men who had risen by merit to such a position, were likely, if they had to make law, to make it, not in a pedantic spirit, but in a spirit of broad statesmanship.

When in the Middle Ages the new countries of Europe began to feel the need of laws, the Roman law struck them as free from national peculiarities and local characteristics. It was equally suitable for men of all the races from which have sprung the Frenchman, the German, and the Italian. Even looked at from the standpoint of the nineteenth century, the Roman law still impresses the student with its universality. Mellish, L.J., called it "a system that more than any other exhibits the principles which ought to, and to some extent do, underlie the jurisprudence of all nations."

2. Next to its universality, it was the fulness and refinement of the Roman law which led the European peoples to adopt it. Rome had lived through centuries of refinement and civilisation, compared with which Europe in the twelfth century was as barbaric as Uganda is compared with Holland. The scanty and rude customs of the Germanic tribes were silent upon all but a few elementary matters. They provided rules for the husband's rights over the property of the consorts or the lord's rights over his vassals. But the barbarians had lived in the woods and not in cities. They had been warriors and not merchants. When town life began and commerce began it seemed to the young nations a godsend to find that the Roman law gave an answer to

[1] Karlowa: *Römische Rechtsgeschichte*, i. 829.

almost every question which could arise in these new conditions.

3. No doubt the prestige which still attached to the great fallen empire helped to win acceptance for her laws. Rome had for ages been the great centre of civilisation and the traditions of her wonderful organisation had never died away.

4. The immense influence of the mediæval Church was at the crucial moment cast in favour of the Roman law. In the confused period when each race had its own law and a judge had to decide each case not by the territorial law, but by the personal law of the defendant, the Church found it best to adopt the Roman law. Questions affecting the property or the priests of the Church were governed by the Roman law. *Ecclesia vivit lege romana.* Among the Franks the regular clergy—the Cloisters—were under Roman law, the secular clergy under their personal law. In Lombardy all priests were under the Roman law (Brunner: *Deutsche Rechtsgeschichte,* i. p. 269). Upon such subjects also the Roman law was much fuller than any barbarian customary law. As might be expected there are differences as to the extent of the rule. No doubt at a later period when the canon law had itself become an important body of law, the Church claimed to be exempt from the civil law, and sometimes even showed hostility to that system. But this was after the success of the Roman law was assured. At an early stage, when it was still struggling for acceptance, if the clergy, the only educated class in the community, had set their faces against the Roman law its fate in Europe would have been very different.

To us at the present day the Roman law is valuable especially upon these grounds—(1.) Its intrinsic merit. By this I mean its value as a substantive part of our knowledge of law. The discussions of the great Roman jurists will always remain models of legal reasoning. They possess in a high

degree the faculty which is of all others the most important for a lawyer—viz., that of discovering the general principle which ought to be applied to a particular set of facts. They abound in luminous general principles which they illustrate by showing their application to different groups of circumstances. (2.) As an introduction to legal terminology and method. The terms and classification of the Roman law have been retained by the modern *Droit Civil.* It is no slight advantage which the continental lawyer enjoys over his English brother that he employs a terminology which is understood over a great part of Europe. We learn in the Roman law the precise meaning of legal terms current in many countries. The Roman law, it has been said, tends to become the *lingua franca* of universal jurisprudence. I am afraid definitions are not always very interesting, but nothing is more important for the legal student than to learn the definite and precise meaning of the terms which meet him on the pages of every law book. A considerable part of the time given to Roman law is well spent on the careful explanation of such terms as "Person," "Obligation," "Contract," "Thing," "Possession," "Prescription," "Real and Personal Rights," and many others. (See this aspect of the subject well stated by Maine in an essay republished in the volume on Village Communities, p. 330.) (3.) As a historical introduction to the French civil law. *Sine historia jurisprudentia cœca est.* So much of the French law has grown out of the Roman that the modern law is only fully understood when we study its roots in the ancient world and trace its development down to the present time. (4.) As a study of legal history. This, though the least obvious, is, I am disposed to think, the greatest merit of the Roman law to a student of the present day. The law of the Corpus Juris is the outcome of a history of a thousand years. From B.C. 450, when the Twelve Tables were published to A.D. 564, when the last of Justinian's Novels appeared, is

more than a thousand years. During that long period we are able to follow the slow growth of the law. We can see how the rude customary law of a primitive pastoral people was shaped and moulded to fit the needs of a great imperial nation whose mission it was to civilise the western world. No other study is so well calculated to teach us what legal rules are permanent and universal in their nature, and what are temporary and local.

CHAPTER II.

The Growth of Commercial Law at Rome.

The history of Roman law exhibits a gradual process of evolution from a narrow, rigid, and formalistic legal system, to one of extreme comprehensiveness, flexibility, and independence of form.

The rules of succession, the forms of contract, and the actions by which remedies might be sought, with which we are confronted at the dawn of Roman history, bear the marks even then of a rude antiquity, and are based upon institutions the origin of which runs back to a primitive pastoral community, in which the unit was the family and not the individual, and the paterfamilias the administrator and not the owner of the family estate. The crude symbolism which barbarous and semi-barbarous people are wont to consider as indispensable for the due solemnity of legal acts is everywhere strikingly manifest, although Mommsen, no doubt rightly, insists that, at the earliest period known to history, the sign was already giving place to the thing signified, and the symbol ceasing to be necessary to give legal validity to the act which it accompanied.

If a Roman citizen wished to free his son, or his slave, he must appear with him before the magistrate. A friend of the person to be set free, or an official representing himself as a friend, touched him on the head with a wand, and claimed him as a free man. When the *assertor libertatis* had fulfilled his office, the paterfamilias turned the new freedman round in token that he might go where he liked, and gave him a

gentle blow on the cheek, whereupon the magistrate pronounced the emancipation completed. The interruption of prescription was symbolised by breaking a twig; divorce, by the wife handing back her keys to the husband.

A person entering a house in search of stolen goods, must wear no clothing but a linen towel round his loins, and must cover his face with a basin.

The pursuer of a civil action cited a witness by touching his ear, and a clod of earth was brought into the Court to represent a field of which the ownership was disputed. A will was made at first by a declaration in the popular assembly, *calatis comitiis*, and at a later period by a fictitious sale of the testator's whole estate. A piece of copper, weighed in the scales, stood for the price paid by an imaginary purchaser, and five citizens must attend as witnesses, possibly to represent the whole body of the people as divided into five classes by the scheme traditionally ascribed to Servius.[1] Such examples of legal ceremony might be easily multiplied.

Even for a considerable period after the date of the Twelve Tables, the remedies which existed were few in number, and the proceedings for obtaining them marked by an arbitrary and vexatious technicality, For the enforcement of all civil rights there were only five forms of action, the so-called *legis actiones*, in which English lawyers have detected a close analogy to the old "real actions" of the English common law.

The slightest deviation from the precise form of words to be employed, or the most trivial error in a step of process, was fatal to success. Gaius instances the case of a man who lost an action against another, for cutting down his vines, because he had used the specific word "vines" instead of the generic "trees," which occurred in the Twelve Tables (Gaius, iv. 11). Is it surprising that, as he says,

[1] See *infra*, p. 66.

"all these actions of the law gradually fell into great discredit, for, from the over-subtility of the early lawyers, who then interpreted the law it came about that a litigant who had made even the slightest mistake, lost his case" (iv. 30)?

In the early period, the only contracts legally enforceable were sale—*mancipatio*—and loan—*nexum*—which must both be constituted *per aes et libram*—*i.e.*, by the old ceremony of having the price to be paid, or the loan to be advanced, weighed out by a *libripens*, or weigher, in the presence of five citizen-witnesses, accompanied by the use of solemn words. After the introduction of coined money, the weighing out of the *aes* became a mere solemnity, the piece of copper in the scales being a symbol of the money which was the actual consideration for the contract, so that Gaius speaks of *mancipatio* as a fictitious or imaginary sale—*imaginaria quædam venditio* (i. 119). The inconvenience of a system, under which one could not validly buy a bushel of wheat, without calling in five witnesses, and getting a *libripens* to weigh out an imaginary price, hardly needs to be dwelt upon. No doubt, the ordinary transactions of daily life must have been, to a large extent, conducted without this cumbrous ceremonial. But the law of a country is in an eminently unsatisfactory condition, if its forms are so awkward that the citizens in their usual commercial dealings are compelled to disregard them, and to rely on the good faith of parties for the fulfilment of contracts which cannot be enforced by process of law.[1]

In a word, the early Roman law, the *jus civile, par excellence*, or, as it is sometimes called in the texts, the *jus*

[1] *Res mancipi—i.e.*, practically, heritage in Italy including, as pertinents to land, slaves and beasts of burden, continued to be transferable by *mancipatio* only till towards the close of the Republic, when the Prætorian introduction of the *exceptio rei venditæ et traditæ*, and the granting of the *actio Publiciana in rem*, made *mancipatio* really useless.

Civile Quiritium or *Romanorum*, was a stiff and crude system, under which the form was everywhere emphasised, the substance often neglected.

Its remedies were cumbrous, inadequate, and thick-sown with pitfalls for the litigant. It possessed none of the simple contracts indispensable for the development of commerce, had no law of partnership and none of agency. But great as were the intrinsic defects of the early Roman law, its efficiency as an engine of civilisation was even more impeded by the fact that its protection was sternly refused to all but the citizens of Rome herself. The peregrin—the stranger within the gates—was an outlaw. His family relations and his commercial dealings were alike excluded from legal recognition. If he married a Roman citizen the marriage had none of the jural effects of a citizen-marriage. He could not enter into the only contracts which the law enforced. It was of no avail for him to go through the forms of *mancipatio* or *nexum*. Nay, so inflexible was the law that the contract was void, not only if one of the parties, but even if one of the witnesses was an alien. The unprotected position of a foreigner at Rome was forcibly stated by Mommsen. "Whatever the Roman burgess took from him was as rightfully acquired as was the shell-fish belonging to nobody which was picked up by the seashore." This view of the alien, as legally *incapax*, is one of the most striking features of ancient society. To the Roman, the *jus civile* appeared by its very nature a law for Romans, and for Romans only. It was bound up with the worship of the Roman gods, in whose protection no foreigner had any part or lot. He did not regard the foreigner as necessarily a landless man, belonging to no city, an enemy of society, ἄπολις or, in the Homeric language, ἀθέμιστος. The alien might belong to a recognised community, having a *jus civile* of its own. But at Rome his national law had no force, and the law of the Romans did not extend to him.

An amusing instance of the law, not applying to foreigners

at a much later period, about 213 B.C., is recorded by Livy. In the agony of the Second Punic War, C. Oppius, the tribune had carried a law, forbidding any woman to wear more than half-an-ounce of gold in ornaments, or to appear in a gay coloured dress, or to drive in any town or city, or within a mile thereof, in a carriage drawn by horses, unless it were to attend the religious rites. In a very human touch, Livy remarks on the indignation of the Roman women at seeing the wives of the Latin allies driving in the streets of Rome, brave in purple and gold, while they had to go on foot, clad in plain apparel.[1]

A system of law and of legal machinery such as this manifestly required great modification, if not entire recasting, if it was to be rendered adequate to the needs of a rapidly advancing people. It might be tolerable during the period in which Rome was merely an isolated burgh, possessing, at the most, an ill-defined and disputed hegemony over the communities in Latium. But shackled by its restrictions, the city would never have attained to the glory of Rome, the queen of Italy, much less to that of Rome, the mistress of the world.

That a state of the law so ill-adapted to commerce was so long permitted to endure, is to be attributed mainly to the fact that the Romans in early days were primarily an agricultural, and not a mercantile people. Unlike the Greeks or Carthaginians, they did not turn first or most naturally to trading, and, especially, maritime trading. Indeed, a certain contempt for commerce, and a preference for rural occupations, was throughout the Republic highly characteristic of the Romans. When Cicero says, "trading, if it is on a small scale, must be esteemed a sordid thing,

[1] "At, Hercule, universis (*sc.* feminis Romanis), dolor et indignatio est, quum sociorum Latini nominis uxoribus vident eo concessa ornamenta, quæ sibi adempta sint; quum insignes eas esse auro et purpura; quum illas vehi per urbem, se pedibus sequi: tanquam in illarum civitatibus, non in sua, imperium sit" (Liv. 34, 7).

. . . but of all ways by which money is to be made, none is better than farming, none more fruitful, none more sweet, none more worthy of a free man" (De Off. i. 42, 151), he strikes a note at once familiar and pleasant to a Roman ear.

From this cause, added to the natural conservatism of the people, and the almost superstitious reverence for the *jus civile*, the development of the law in a direction favourable to commerce was neither early in its commencement, nor rapid in its progress.

The first important step was taken, not by introducing changes into the law itself, but by admitting to its protection, to a strictly limited extent, certain privileged communities or individuals. This was done by making grants of *conubium*, *commercium* and *recuperatio*. In making treaties with allied peoples, especially with those of the Latin stock, it became usual to introduce a clause providing that the two peoples should have mutual rights of intermarriage, of trading, and of action. It is probable that the clause was commonly expressed in this general way and that the law to be applied was always the *lex loci actus*.

The effect of such a clause was by no means to place the foreigner who was covered by it, in the position of a *Civis Romanus*. Legal capacity is by us regarded as a bundle or group of faculties bound up together, and we are not in the habit of treating a man as legally *capax* with regard to certain acts, and *incapax* with regard to other acts. But a foreigner at Rome who enjoyed *conubium*, *commercium* and *actio* was thereby entitled to exercise certain acts which the Roman law would recognise as valid, but was, as regards other acts or rights, not included in the grant to him, still outside the legal pale. The same phenomenon occurs among the Greeks who, in their treaties with other Hellenic states, made mutual concessions of ἐπιγαμία, κοινωνία ἀλλακτική,

and δικαιοδοσία. A peregrin at Rome who had *conubium* might lawfully marry a citizen wife. But the marriage was a peregrin marriage. The wife did not pass into the husband's *manus*, and the children were not in his *potestas*. The institution of *patria potestas* was only possible as a relation between *cives*. Ulpian says, *neque peregrinum civem Romanum neque civis Romanus peregrinum in potestate habere potest.* The grant of *conubium*, accordingly, did not carry with it any part in most of the family law of Rome, *manus, potestas, emancipatio, adoptio, legitima tutela* and the like. The peregrin was not a member of a *gens*, he had no agnates, he could not be a patron, nor could he take as an heir *ab intestato*.[1] *Commercium* conferred by grant in general terms carried the capacity for being a party to *nexum* and *mancipatio*, but whether it gave the peregrin the capacity to become the owner of Roman land, *fundus Romanus*, is matter of dispute.[2] Voigt thinks that the ownership of land was inseparably connected with the tribal organisation, and strictly confined to *cives*.[3] *Commercium*, doubtless, enabled the peregrin to acquire a *pignus* or hypothec, and if the peregrin had not *commercium agrorum* he would be included among the persons referred to by Modestine *in quorum finibus emere quis prohibetur, pignus accipere non prohibetur.*

Recuperatio was the right granted by treaty of having

[1] This view of the limited effect of *conubium* is strongly supported by Voigt, *Das jus naturale, &c., der Römer*, vol. ii. p. 117 *seq.*

[2] There might be a special grant of *commercium* to an individual, and that might be limited to particular objects. Livy mentions such a grant made to certain envoys, in the year B.C. 170, of the right to buy ten horses each. Petentibus (*sc.* Gallorum legatis Romam missis) data, ut denorum equorum iis commercium esset, educandique ex Italia potestas fieret (Liv. 43, 5).

[3] The analogy of the Greek concession of similar rights supports this. They distinguished ἔγκτησις, the right to acquire land, from κοινωνία ἀλλακτική, the capacity for entering into mercantile contracts, and sometimes granted both. See Voigt, vol. ii. p. 111.

questions between citizens and peregrins who enjoyed the privilege, or between such peregrins *inter se*, referred for trial to sworn *recuperatores*, or "recoverers."

It is possible that the Court was composed of an equal number of arbiters from both nations and an umpire or oversman. They sat at the place where the contract was made and were bound to have the process terminated within ten days. A modern analogy might be found in the mixed Courts of seven judges which decide cases in Egypt between natives and members of the privileged countries.[1]

Treaties containing mutual grants of *conubium, commercium and recuperatio* appear to have been made with most of the Italian communities including the Greek colonies in South Italy and Sicily. As regards these last it is not certain *conubium* was included in the grant.

This clumsy expedient of conceding limited rights to the members of favoured nations must have afforded a very partial remedy, for with the growth of the city an increasing number of foreigners, especially from the East, flocked to Rome who did not enjoy *commercium*. And the system of favoured nations was rendered altogether unnecessary by the rise of an entirely new branch of law at Rome. This was the *jus gentium*. It is impossible to fix any particular moment of time as that of the rise of this new system, although Voigt makes a very ingenious attempt to do so. But a number of facts point to its obtaining a firm foothold during the sixth century of the city. The great extension of intercourse with extra-Italian countries which took place about that time, the absence of clauses of *commercium* in the treaties of this period, and the appointment of a Prætor Peregrinus about 240 B.C., or as some think a few years earlier, seem sufficiently to support this conclusion.

[1] There is a separate treatise on the subject by Sell, *Die Recuperatio der Römer*, and a very elaborate account of Voigt. But the *data* are very scanty and many of the conclusions are quite conjectural. See *infra*, ch. 32, s. 4.

Nothing can be more misleading than to conceive of the *jus gentium* as in the least degree analogous to what is now called private international law. The fundamental principle upon which this system rests—viz., that in certain cases the Court will decide a question before it by the application of the law of a foreign independent power was never admitted at Rome. Indeed the birth of that science, as Huber has shown, was directly traceable to the break-up of the Roman Empire, and the conflict of laws which ensued on the rise of a number of different European states with their various laws and customs.

There was never any question at Rome as to whether either the *lex loci actus* or the *lex domicilii* should prevail over the *lex fori*. It was, indeed, very usual when a foreign country had been subdued and reduced to the rank of a province to leave it a limited "home rule," and allow it to retain its own laws ; and the provincial constitution, the *lex* or *formula provinciæ*, frequently contained a clause conceding to the people the right *suis legibus uti*. But the judge who administered this law was no more applying private international law that is the Judicial Committee of the Privy Council when it decides a case from Jersey by the law of that island.[1]

It is unfortunate that no uniform rendering of *jus gentium* has been adopted by English writers.[2]

The definition of the term with which the work of Gaius opens, adopted by the compilers of Justinian's Institutes, is "the law which natural reason settles for all mankind, which is equally observed among all peoples, and is called the law of the nations, being as it were the law which all the nations use."[3] This definition is obviously coloured by the philo-

[1] It is surprising to find *jus gentium* given as "international private law" by the translator of Mommsen (*History*, i. 166).

[2] Some of the Germans—*e.g.*, Jörs, employ the word *Weltrecht* for *jus gentium*, and *Landrecht* for *jus civile*.

[3] "Law of Nations," is inseparably associated in English with international law.

sophic speculations of a later age than that at which the *jus gentium* took its rise. The closest modern parallel is the law-merchant, and Bell's definition of this in the preface to his Commentaries would have been accepted by a Roman lawyer almost word for word, as an excellent account of the *jus gentium*. "The law-merchant is universal. It is a part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of Courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle, not making the law, but binding it down, not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence."

No doubt, ultimately, the *jus gentium*, or the equitable principles underlying it, invaded other branches of Roman law. But it was in its origin and in its important aspect for us, a body of principles of general mercantile law administered by a Court with wide equitable powers. In its root-conceptions, and in its animating spirit, the *jus gentium* was the antithesis of the *jus civile*. Before the one the foreigner had no rights, except such as flowed from the free grace of the Roman state. Before the other Roman and Greek, Carthaginian and Syrian, in a word, every free man stood on the same footing.

To the one the letter—the *rigor juris*—is everything; the latter looks to the spirit, the *æquitas*. The question in the *jus civile* is, "Were the forms complied with?" in the *jus gentium*, "What was the intention of parties?" The spirit of the *jus gentium* was to have constant regard to the *bona fides* of the parties, and to prevent the technicalities of

law leading to the denial of substantial justice. The *jus civile* asked only, "Is it so nominated in the bond?" The whole mercantile law of Rome, including the law of sale, hiring, deposit, mandate, partnership, and agency, belongs to the *jus gentium*. And as Professor Sohm justly observes, it is the law of obligations, and especially the law of these consensual contracts, the *negotia bonæ fidei* which forms the really permanent contribution to practical jurisprudence. What he says of Germany is true here also.

"As to the remaining parts of Roman private law they never again attained to complete and absolute dominion, and are all on the point of being, more or less, superseded, and even formally abrogated by the coming civil code of Germany. But the Roman law of obligations will endure. It cannot be abolished. The intention of the purchaser, and hirer, &c., is the same in all ages, and it is this intention alone that Roman law has made clear. The legislation of Germany may indeed repeal the Roman law on this subject; in point of fact, however, it cannot fail to be a substantial re-enactment of it."

How were the Romans, stubbornly attached as they were to the old *jus civile*, and by no means free from narrowness and even philistinism on the intellectual side, induced to open their doors to a system so un-Roman? Ihering, in an eloquent passage in his *Geist des Römischen Rechts*, says: "It was a question of abjuring Rome in Rome herself, of detaching themselves from traditional ideas without abandoning them, and of applying upon an equal footing two opposite ideas to the whole system of the law, the national Roman idea and the cosmopolitan idea, of thinking as a Roman with regard to certain institutions and not others." He compares the moral as well as intellectual qualities which the Romans needed to exert, in order to grapple successfully with the task, with those which a rigidly Catholic country would need to show in admitting Protestants to equal rights and liberties.

To attempt anything like an adequate examination of the causes which led to the admission of the *jus gentium* would be impossible in the space at my disposal. But the following points, especially, are to be kept in view[1]:—

1. The growth of commerce and of intercourse with foreign nations made great modification of the *jus civile* absolutely necessary, unless the progress of the city was to be arrested.

2. This intercourse itself had widened the mental horizon of the Romans by making them acquainted with foreign laws and customs. And among the influences which worked most strongly upon them was their contact with the Greeks, and their increased knowledge of Greek literature and philosophy. It was not that the Romans directly borrowed much of the substantive law, though the *lex Rhodia de jactu* and the law of hypothec, in its origin, were importations from Greece. The Romans had undoubtedly, as a nation, a more decided legal bent than the Greeks, and it is quite characteristic of the difference that the Roman schoolboy learnt the Twelve Tables by heart at an age when the Greek boy was reciting stirring passages from the Iliad and the Odyssey.[2] But the spell which the brilliant and beautiful genius of Greece cast over the society of Rome was not without a

[1] In addition to the two great works of Voigt, *Das Jus Naturale*, &c., and his recent *Römische Rechtsgeschichte*, the reader is referred to the extremely interesting book by Professor Jörs, *Römische Rechtswissenschaft zur Zeit der Republic.* Berlin, 1888.

[2] Cicero laments that this good old fashion has gone out—a parvis enim, Quinte, didicimus "si in jus vocat ito" et ejusmodi leges alias nominare—and "Discebamus enim pueri XII. Tabulas ut carmen necessarium quas jam nemo discit" (*De Leg.* 2. 4. 9. *Ibid.* 2. 23. 59).

It is interesting to notice that, towards the close of the Republic, the Romans of the upper class had much the same feeling about things Greek as the German noble class had about things French in the time of Louis XIV. The Roman nobles affected the Greek language, Greek dress, Greek mode of arranging the hair, and so forth, and looked down upon the simple Roman ways, just as in Germany French was the Court speech, and everything French was thought to have grace and distinction, while things German savoured of the *bourgeoisie.*

powerful effect upon the law. In place of their narrow conceptions of citizen-law before which the alien had no rights, they were introduced to speculations about a natural law applying to citizen and alien alike, and about a commonwealth of all mankind governed by the impartial justice of the gods. This idea of natural law drawn from the φυσικὸν δίκαιον of the Stoa was like a new spirit breathing upon the dry bones of the *jus civile*. Cicero contemplates the training of the lawyer as directly based upon philosophy, instead of as formerly upon a literal knowledge of the Twelve Tables or the Edict.[1]

3. In addition to the growth of commerce and the leaven of Hellenism, the rise of the *jus gentium* was facilitated by a new class of learned and accomplished lawyers, themselves deeply imbued with foreign culture. These early jurists, who were almost all men of rank and wealth, were in the habit of giving advice without fee on matters of business as well as of strict law, and were consulted, Cicero roundly says, "about all things human and divine." The houses of those of them who attained a high reputation were thronged with citizens, who came to consult them about their litigations, the sale or purchase of land, the marriage of their daughters, and even the methods of farming. It is no wonder that Horace says, "the lawyer, when the client knocks at his door at cock-crow, envies the lot of the farmer" (Sat. i. 1, 9). It became usual for young Romans who were intended for a public career to be sent as pupils to the jurists, as Cicero himself was to Scaevola. They were allowed to be present at the consultations with clients, and the master discussed with them the legal questions which presented themselves. It is easy to see how in this way a more free and speculative treatment of law was rapidly engendered. The influence of

[1] Non ergo a prætoris edicto, ut plerique nunc, neque a XII. Tabulis, ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas (*De Leg.* 1. 6. 17).

the jurists rapidly increased, and with the rise of legal authorship, by which a systematic view of some branch of law was made possible, it became the dominant factor in developing a scientific body of legal principles. From the first penetrated with the Stoic philosophy, the jurisconsults gradually became more and more emancipated from the narrow rigidity of the traditional national jurisprudence, a tendency which must have been strengthened by the advent of foreign jurists to Rome. It is not without significance that many of the most famous jurists were themselves foreigners. Salvius Julianus, the compiler of the Edict, was born in Africa. Q. Cervidius Scaevola was a Greek, and of the so-called "classical" jurists not one can be pronounced with certainty to have been a Roman. Of Gaius hardly anything is known, but Mommsen thinks it likely that he was a provincial. Papinian is generally thought to have been a Phœnician.[1] Ulpian tells us himself that he sprang from Tyre. Modestine was from some Greek-speaking province. The history of Paul is unknown. Possibly he may have been from Padua, which has erected a statue to him as a native, but some think he, too, was a Phœnician. It is quite plain that, even admitting the possibility of Gaius, Papinian, and Paul being Romans, they were not Romans of the type of Cato. They belonged to no great Roman family, and had none of the passionate and exclusive conservatism of such Romans *de vieille roche*. In the eyes of these men the *jus civile* had no peculiar sanctity, and the *jus gentium* afforded an admirable field for the working out of general rules of law, and illustrating their application in particular cases.[2]

[1] But Prof. Hofmann thinks he was a Roman, and cites Esmarch as of the same opinion. There appear to be very slight grounds for an inference either way.

[2] The generally accepted view that the influence and fame of the jurisconsults came to a sudden end after the series of the "classical" jurists had been closed by Modestine, is ably combated by Prof. Hofmann in his recent work, *Kritische Studien im Römischen Rechte.*

4. The fourth great cause which facilitated the rise of the *jus gentium*, and, as I have said, this phrase, in the early period at anyrate, means, practically, general commercial law, was the undefined power of the prætor.

The Roman magistrates, from the earliest times, had possessed, under the name of *imperium*, an authority truly sovereign. Part of this prerogative consisted in the *jus edicendi*, or right to issue an edict. By an official declaration the magistrate might promulgate his intention to pursue a certain course, to grant a particular remedy, or sustain a particular kind of defence in given circumstances, and the rule so enunciated became law during his tenure of office.

This power was the safety-valve which preserved the *jus civile* from destruction. The scientific speculations of the jurists would have been comparatively barren if the prætor had not been able to give practical effect to them in the edict.

The appointment, about the year 240 B.C., of the Prætor Peregrinus gave a great impetus to the new law-merchant. Specially empowered to adjudicate in cases between citizens and foreigners, or between foreigners *inter se*, he was, from the first, untrammelled by the restrictions of the *jus civile*, and free to give full play to equitable considerations. The rules and remedies applicable to all mercantile contracts, irrespective of the national law of the parties, received in many cases their shape in his hands, and, being recommended by their fairness and convenience, were afterwards borrowed from him by the Prætor Urbanus, and employed in dealings between citizens only. Jörs says: "The jurisdiction of the Prætor Peregrinus was the workshop (*werkstatt*) in which the *jus gentium* was first admitted in substance as Roman law, while, on the other hand, it there obtained the external form in which it was received into the *jus civile*." It must not be supposed that the quasi-legislative power of the prætor led to the wholesale introduction of new

law. The legal instinct of the Romans preserved them from any such danger. The process was as gradual as the building up of case law with us, and much more akin to that than might at first sight appear. The early edicts probably contained little more than a few particular cases which had actually occurred. In certain circumstances the prætor had exercised his power *adjuvandi, vel supplendi, vel corrigendi jus civile* by granting relief. His successor, recognising the justice and expediency of carrying on the same policy, announced in his edict on assuming office that he would follow this precedent. When the edict had attained greatest volume and perplexity it is probable, as Jörs thinks, that the prætor-designate called in the aid of jurists to advise him what he should retain and what novelties he should introduce. There is pretty direct evidence for this in the accusation made by Cicero against Verres of having called in the aid of dubious characters in drawing up his edict. No doubt better prætors turned to better men. Step by step the edict grew, and the practical impossibility of dropping out any rule once established became at every step stronger, until it crystallised into a traditional body of rules the *edictum tralaticium* which each prætor took over bodily from his predecessor. The edicts of both prætors were consolidated and published in a final form under Hadrian's authority about 129 A.D. This was the natural result of the Empire, as the emperor was not likely to tolerate the exercise of legislative power by the prætors. But the authorities including Mommsen and Lenel, are generally agreed that long before then the edict had become almost stereotyped—*i.e.*, the power of dropping out precedents had been lost, and Cicero was able to speak of it as, in his day, the chief source of *customary* law.[1]

[1] Consuetudinis autem jus esse putatur id, quod voluntate omnium sine lege vetustas comprobarit . . . quo in genere et alia sunt multa et eorum multo maxima pars quæ prætores edicere consuerunt (*De Inv.* 2. 22. 67).

It was in the Court of the prætor that the most illuminating principle of the *jus gentium*—the one which eventually brought about the transfiguration of the *jus civile*—was clothed with circumstance. This was that regard must constantly be had to *bona fides*. *Bona fides quæ in contractibus exigitur æquitatem summam desiderat* (D. xvi. 3, 31). An action laid on any of the mercantile contracts, sale, pledge, hiring, mandate, might be met by the defence that the party seeking to enforce the contract had not shown *bona fides*, and if such a contract had been performed it might, on the same ground, be rescinded (D. xviii. 5, 3; xix. 1, 11, 5). There is a close and striking analogy between the manner in which the prætor slowly modified the *jus civile* and the growth of the equitable jurisdiction of the English chancellors. Let us suppose that a new chancellor in the early days of the Court's history had possessed authority to take the volume of reports in which the judgments of his predecessor were recorded, and to determine what precedents he would follow, and in what analogous cases he would grant similar relief, at the same time striking out the judgments that seemed to him to be erroneous. And let him publish the rubrics of the cases so selected, not in the style, "in such-and-such circumstances it was held, &c.," but in the style, "in such-and-such a state of facts I shall hold so-and-so, or allow relief in such-a-way," and we shall have an almost precise analogy to the promulgation of the prætorian edict. But, having regard to substance rather than form, this was very much the position of the early chancellors.

The chancellor, like the prætor, had a somewhat indefinite right of interference, *adjuvandi, vel supplendi, vel corrigendi juris civilis gratia*. Lord Eldon adopts this phrase of Papinian's as applicable to the function of the Court. In one of his letters he says: "The great defect of the Chancery Bar is its ignorance of common law and common law practice;

and strange as it should seem, yet almost without exception it is, that gentlemen go to a bar where they are to modify, qualify, and soften the rigour of the common law, with very little notion of its doctrines and practice." And one of the greatest of the early chancellors, Lord Ellesmere, says in a passage cited by Mr. Spence: "It (the Court of Chancery) hath jurisdiction to correct the rigour of the law, by the judgment and discretion of equity and grace."

The guiding principle of the chancellor, that effect must be given to "conscience" or equity, is the modern counterpart of the prætorian regard for *bona fides*. Thus, to give a familiar instance, it was a rule of the English common law that a sealed instrument could only be discharged by an instrument of an equally high character. If a debtor in a bond paid the debt, and did not obtain an acquittance under seal, or a surrender of the bond, even though he took a written receipt, he was still liable in an action on the bond. One of the first reforms introduced by the chancellors was to put a stop to this injustice, an apt illustration of the prætor's maxim, *Bona fides non patitur ut bis idem exigatur.*

The ideal constantly present to the mind of both prætor and chancellor was that he must decide the matter according to *bona fides*—"conscience"—extending a remedy, if necessary, where the strict law denied it, and not allowing injustice to be done by a slavish observance of legal technicality. In neither system was the mistake made of supposing that abstract justice, based on *a priori* conceptions of natural law, was capable of being universally enforced by the Courts. But in both it was seen that there were many rights not different in kind from those enforceable at law, for which, for some merely technical or historical reason, no remedy had been provided, and that there were other cases where *summum jus* was *summa injuria.* Here it was that prætor and chancellor alike saw their opportunity *adjuvandi, vel supplendi, vel corrigendi.* Such a prætorian remedy as

the *actio Publiciana in rem* falls strictly within modern definitions of equity. If a thing had been transferred to any one from a person not the true owner, in a manner which would have passed the property if the transferor had been the *dominus*, the transferee became the *bona fide* possessor. So also did a person to whom a thing had been transferred with the intention of passing the property, but in a mode inadequate by the strict law to effect that purpose, as —*e.g.*, if a *res mancipi* were conveyed without mancipation. In either case the title of the possessor would ripen into ownership by usucapion. But if, before the prescriptive period had run, the possessor chanced to lose his possession, he had at law no action for the recovery of the thing. Here the prætor stepped in and gave him an action based on the legal fiction that the usucapion had been completed. Applying Mr. Snell's language, the right was "a portion of natural justice, which was of a nature to be judicially enforced, but which the Courts of the common law (or, in Roman language the *jus civile*) omitted to enforce for reasons of a purely technical and formal character." The prætor, no less than the chancellor, was "influenced thereto by considerations of what was right in substance and in conscience."

In the beginning the chancellors conceived themselves hardly more bound by authority than the early prætors, and free to decide every case according to their private conscience. The jealousy of the common law judges made them affect to take this view of Chancery long after precedents were constantly cited there. In *Fry* v. *Porter*, 22 Charles II., Chief-Justice Vaughan was called in to assist the chancellor. An authority being referred to by counsel, the Chief-Justice said, "I wonder to hear of citing of precedents in matter of equity." Selden's witty remark, though hardly seriously meant by him, expressed an opinion at one time widely entertained by common law lawyers: "Equity is a roguish thing. For law we have a measure, and know what we trust

to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience."

But just as the prætors soon began to take up more and more of the edict of their predecessors, the Chancery judges became more and more bound by precedent, and by the maxim *æquitas sequitur legem*, a maxim itself borrowed from the prætorian rule, *jus prætorium jus civile subsequitur*. And equity, as every one knows, has now become as tralaticious as the edict. One of the most famous of its modern expounders, Jessel, M.R., discussing in a recent case (*Johnson* v. *Crook*, 12 Chanc. Div. 649), whether a rule of equity contended for had been established, said: "Having examined not only the authorities I have mentioned, but some others to which I have been referred and have found myself, I may say, I cannot find a trace of it before the case I am about to mention, and therefore, if there is such a law, it must have been made in the year 1866. Now, it could only have been made in the year 1866 by statute, because in the year 1866 equity judges did not profess to make new law, and when they state what the law is, they do not mean, as might have been said two or three centuries before, that that was law which they thought *ought* to be law."

The analogy between Roman and English equity deserves a much fuller examination.[1] But even in outline it may

[1] Mr. Austin, in a very cursory comparison (*Jurisprudence*, vol. ii. p. 64 *seq.*), presses, I venture to think, somewhat unduly the points of difference. He does not refer to the most essential resemblance—viz., the constant aim at regard for the spirit and not the letter of the law. He says the prætorian equity was administered by the ordinary civil tribunal, and the English equity by an extraordinary tribunal. But this is at most a difference of form, and in addition it overlooks the important part played

help one to understand, what is at first extremely puzzling, how the broad and equitable principles of mercantile law almost imperceptibly worked their way into the Roman system of jurisprudence. The *jus civile* was undermined bit by bit without being formally abrogated. Step by step the *jus gentium* advanced, until by the combined efforts of jurists and prætors the Roman system of mercantile law became fit to be the model upon which the law of most of the European states of to-day has been largely moulded.

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at Rome by the Prætor Peregrinus, who was essentially a prætor to administer equity and not strict law. And his statement that "the equity administered by the Roman prætor was *statute* law, or law promulged in an abstract or general form; whereas all, or almost all, Chancery law is not *statute* but *judiciary* law" is, for the reasons given in the text, quite misleading. Upon the general analogy, I may refer to the interesting article on "Equity," by Mr. Æneas J. G. Mackay, in Green's "Encyclopædia of Scots Law."

CHAPTER III.

The Early Customary Law of the Romans.

Section 1.—Early Social Conditions.

The institutions, the customs, and the beliefs of the Romans, in the earliest period at which we meet them, show a marked resemblance to those of the ancient Greeks, of the Hindus, and, in short, of all that family of nations generally called Aryan or Indo-European. The ancestors of Hindus, Greeks, Romans, Celts, Slavs, or whatever they may have been, carried with them to their new homes the same stock of ideas, customs, and beliefs. They have the same notions about the family, about property, and about religion. The Roman, when we first hear of him, is a settler or small farmer, living in a simple, agricultural community. His forefathers had, in all probability, passed through two earlier stages, before becoming farmers settled upon the land. It may be assumed that at one time they had been isolated hunters, and that at a later date they had become nomad herdsmen. For these seem to have been stages in the evolution of all these peoples, and, indeed, they may almost be regarded as normal stages in the evolution of human society. But the earliest history or legend of the Romans exhibits them as farmers already having a settled dwelling-place.

Section 2.—The Early Political Organisation.

According to the ancient tradition, the city owed its origin to the union of three tribes, the *Ramnes*, the *Tities*, and the

Luceres. Probably, if there is any truth in the legend,[1] it does not mean more than that three little neighbouring communities coalesced. Very fanciful attempts have been made to assign different characteristics to these tribes. It has been said—*e.g.*, that the doctrine of *patria potestas* seems to have been brought in by the Ramnes, the religious rites by the Sabines, and so on.[2] But all this is pure speculation, and speculation not even supported by much inherent probability.

The population of the city was divided into thirty *curiæ*, perhaps on the basis of ten to each of the original tribes. The *curiæ* were, apparently, something like parishes.[3] Each *curia* had its own priest, its own chapel, and its own public-hall for meetings. It formed a corporation. But the union between the members of the same *curia* differed from the union between the parishioners, in that it was not based on the fact of residence within the same local area. The *curia* was an artificial agglomeration of *gentes* or clans. It was a political division, but not territorial as modern political divisions are. The legend says there were exactly ten *gentes* in each *curia*. There is a very suspicious look about this precision, but it is not impossible that it was so.[4] What is certain is that the early inhabitants of Rome were divided into clans. Ancient society among the Aryan peoples, as Maine[5] has pointed out, presents concentric circles.

(1.) The Family, which is the true unit.

(2.) The *Gens* or Clan composed of a number of families descended or feigning descent from a common ancestor. If a clansman left no other heirs his estate went to his clan.

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[1] Karlowa, i. 31; Cuq. i. 30.

[2] Muirhead, second edition, p. 4.

[3] Cuq. *l.c.*

[4] Something very similar appears still to exist in China. In that country society is organised to this day upon the system of family groups. About ten families form a *chia* under a *chia chang*. *Ten chia* form a *pao* or *li* under a *pao chang*. The chiefs of the *chia* and of the *pao* are chosen by the members of the families (Post, *Grundriss der Ethnologischen Jurisprudenz, i. 160).*

[5] See *Ancient Law*, p. 124.

(3.) The *Civitas*, which is an aggregate of *gentes;* and, sometimes,

(4.) *Fœderatæ Civitates.*

Each of these circles has its own private religious rites, communion in which is the exclusive privilege of its members. Among all primitive Aryans the right of participation in *sacra* must exist before a man and a woman can contract a lawful marriage. When Ulpian says without *conubium* there can be no *justum matrimonium*, he is stating a doctrine of the highest antiquity.

It is only the members of the *gentes* who have any political rights. And in the beginning the whole of the land is divided among them. They are the sole landowners. Residence within the city boundary, freedom, wealth cannot enfranchise a man. He must belong to a *gens*. The Clansmen alone are the *patres* or burghers. The rest are at best free Outlanders. The city grows out of the union of a number of clans. At a still earlier period the clans are themselves independent. Still further back the patriarchal family is an independent community. But at a very early period we find the population of Rome comprises many persons who are not members of the patrician *gentes*.

Section 3.—The Clients.

There is a large class of persons called *clientes*—*i.e.*, hearers or dependents. They are all attached to a *paterfamilias*, and stand to him in a relation which in many of its incidents resembles that of a vassal to a feudal lord. The client is a freeman, but he has not full political rights, and he is bound to perform certain services for his patron. Generally he will farm land which belongs to the patron. The patron is bound to protect the client, and in the early times no duty was held more sacred. It is very common in ancient societies to find such a class of dependent freemen.

They are frequently the original inhabitants of the country, who after the conquest are allowed to stay on in this dependent[1] position. It is not unlikely that this was the case with the Roman clients, but our information is too scanty to permit of certainty.

Section 4.—THE *PLEBS.*

Besides the clients we also find, very early, another class —viz., the Plebeians or the *Plebs.* Their exact origin has been much disputed. Very likely they consisted of several elements. A *gens* would sometimes become extinct. The clients, who had been attached to the *patres* of that *gens* would thus be left without a lord. Patrons from time to time might enfranchise their clients. In fact the whole system of clientage fell into decay at an early period, and some of the highest authorities, including Mommsen,[2] think that the plebeians originated in the decay of clientage. But there is a good deal to be said for the view of Niebuhr and others that it is not likely that this was the origin of the plebeians as a class. It seems likely enough that as Rome gradually conquered the little towns and settlements in her neighbourhood, she should leave their inhabitants their full freedom and encourage many of them to settle in Rome. And small grants of land were made to them, either in their original homes or in the suburbs of Rome. And, no doubt, as Rome grew, strangers would come in. We may easily suppose that most of the artisans came in from the country. For the Romans at first were purely farmers and fighters, and looked down with contempt on handicrafts. We shall, probably, not be wrong in assuming that the plebeians

[1] *Cf.* the *læti* of the early Germanic tribes (Glasson, *Histoire du droit et des institutions de la France*, vol. ii. 36) and the inferior class in some of the Indian village-communities; Maine, *Village Communities*, 176; and *cf.* Maine, *Early History of Inst.*, 84.

[2] *History* (Eng. transl.), vol. i. p. 90.

ncluded landless or enfranchised clients and their descendants, conquered Latins from the country-parts near Rome, and outlanders from more remote parts of Italy. Most of the plebeians were of the same stock as the Romans, had the same language, and the same customs. As they were not clansmen, it seemed quite natural that they should be excluded from the assemblies and from participation in the sacred rites of the *gentes*. They were free outlanders. The patricians had with the plebeians no communion of *sacra* and, consequently, intermarriage was unlawful. The patricians even affected to believe that among the plebeians themselves there were no lawful marriages and no legal relationships. Patricians, at least when heated with debate, spoke of the unions of plebeians as mere promiscuous intercourse, only comparable to the alliances of wild beasts.[1] The population of early Rome consisted then of these three classes:—

(1.) The *patres* or *cives optimo jure*, who were members of *gentes*, could take part in meetings of the curiate assembly, could contract *justæ nuptiæ*, could drive cattle on the *ager publicus*, and could invoke the assistance of the tribunals.

(2.) The Clients, who belonged to the *gentes* as passive members, and shared in the religious rites, but had no votes in the *Comitia*, and looked to their patrons to represent them both in the assembly and in the Courts.

(3.) The Plebeians, who were freemen, had no patrons, and owned their little farms. They had, however, no share in the *sacra*, in the public lands, or in the government.

Section 5.—PATRICIANS *versus* PLEBEIANS.

The antithesis between the plebeians and the patricians is not that between the rich and the poor, for among the

[1] "*Quam enim aliam vim conubia promiscua habere, nisi ut ferarum prope ritu vulgentur concubitus plebis Patrumque?*" (Livy, *Hist.* iv. 2. The whole passage gives an interesting picture of aristocratic insolence.

plebeians there were rich men ; nor that between the noble and the *bourgeois*, for it is probable that many of the noble class of the conquered Latin towns were to be found among the Roman *plebs*. It is the antithesis between the burgher and the outlander. The impossibility of keeping a mass of freemen without any legal rights led the Romans before long to the expedient of granting to the *plebs* all the rights which belonged to private law. They recognised their family relationships, allowed them to own land and to buy and sell in the market, but for a long time managed to exclude them from all political rights. Even some of the ceremonies of the family law of the patricians were looked upon as *publici juris*, and so impossible for a plebeian. Such—*e.g.*, were the ancient form of marriage called *confarreatio* and the mode of adoption called *arrogatio*.

Section 6.—Senate and Comitia.

The early city was governed by the king, the senate, and the *comitia curiata*.

The king was the high priest, the chief justice, and the commander-in-chief of the little community. How far he was elective, how far hereditary, and the precise limitations on his powers are questions about which there has been great difference of opinion.[1] Custom required him to consult with his great council of advisers, the Senate. He was, however, at liberty to act contrary to their advice.

The Senate consisted of three hundred members—one from each *gens*. Karlowa (i. 41) thinks the king nominated a representative from each *gens*. But one would be disposed to suspect that the *gens* would choose their own spokesman. And in the earliest times it is probable that each *gens* had a chief, as the Highland clans had in Scotland, and that the Senate consisted of the hereditary chiefs of the clans. Below

[1] See—*e.g.*, Cuq. i. 36 ; Karlowa, i. 27.

the Senate in power and dignity came the *comitia* or general assembly of all members of the *curies*. This was a mass meeting of all the citizens who belonged to the *gentes* Hence the plebeians were excluded. This is, however, disputed by some writers of great authority.[1] A change in the law had to be initiated by the king, and then laid before the *comitia*. They must simply vote "yes" or "no." The share of the *comitia* in legislation was in fact more like that of the whole body of citizens in a Swiss canton [2] under the modern system of referendum than like that of a parliament in our sense of that term. If the *comitia* decided for the law, it still required the ratification of the Senate.[3] But in such a society there is extremely little legislation. The law of the family was too sacred to touch. There was no commerce. The men were always busy, either farming or fighting, and but for the constitutional difficulties which arose from the disability of the plebeians, we should hardly hear of any legal changes. And there was the less need of many laws because the force of customs was so strong. To a great extent a *gens* was autonomous. It supported its own members, punished the unworthy, and exacted vengeance or satisfaction [4] from an outsider who had wronged a clansman. Within the family again the law was almost silent. It stopped at the door of the house. Inside it the *paterfamilias* was almost an absolute monarch, except for the restraints of public opinion.

The law of the Regal Period then was exclusively, or almost exclusively, unwritten law—the ancient customs of the people.

[1] See references in Willems, *Le Droit Public Romain*, p. 5.
[2] See Lowell, *Governments and Parties in Continental Europe*, ii. 238.
[3] See Karlowa, i. 46, for discussion as to *auctoritas patrum*.
[4] Cuq. i. 71.

CHAPTER IV.

The Patriarchal Family.

Section 1.—The *Patria Potestas.*

The central fact of the society of early Rome is the doctrine of *patria potestas.* Maine says it is "the first and greatest landmark in the course of legal history."[1] The Roman family in ancient times is an *imperium in imperio.* It is governed by the *paterfamilias.* The wife, the children, the slaves, the farm-house, the flocks and herds are in his hands. Even the word *familia* is used to include the property as well as the persons. The *paterfamilias* determines who shall belong to the family. He may decline to admit a child whom his wife bears to him. He can expel a member from the family. No member of the family but himself can own anything except upon sufferance. They cannot marry without his consent, and even if they are married he can divorce them. He has the power of life and death over wife and child and grandchild no less than over the slaves or the oxen. The family is a corporation which never dies. The ancestors, the living, the generations to come, all belong to it. When the original patriarch or *paterfamilias* dies each of his sons becomes a a *paterfamilias.* The original family is broken up into as many families as there are sons or male representatives of deceased sons. The early family has, as it were, three faces:—

(1.) *Religious.*—It has its separate and exclusive *sacra,*

[1] *Early Institutions,* 216.

communion in which is the closest link between members of the family—the dead as well as the living. The hearth is the altar of this private cult, and the *paterfamilias* is its priest.

(2.) *Political.*—It has its own rules. The *paterfamilias* can make laws for it. He has the power of life and death over its members. Within the family circle he is absolute. The law of the state does not extend there. The *paterfamilias* is, in a sense, its king.

(3.) *Proprietary.*—Every person and everything within the family belong to the *paterfamilias*. He is the owner of the family.

The patriarchal family in early Rome as in ancient Greece and in modern India rests upon ancestor-worship. This is one of the most universal forms of religion, and was common to all the Aryan peoples. It is found also among the ancient Arabs, the Chinese, the Japanese, and many races of savages.[1] It is still the fundamental belief of the Hindus. The interior of India, little known to Europeans till modern times, for ages utterly uninfluenced by western thought, is a museum of customs and beliefs which were the common heritage of the Aryans, but have long disappeared in Europe. Ancestor worship has survived also in other places, remote and changeless—*e.g.*, among the Ossetes of the Caucasus.[2]

The ancient Roman regarded the family as the great instrument for keeping up the peculiar rites upon the due observance of which depended the happiness of the dead. To neglect them was to commit an abominable cruelty to his ancestors, and to bring down a curse upon his house. Upon the due performance of the family *sacra* by his son his own

[1] Post, *Grundriss der Ethnologischen Jurisprudenz*, i. 130.

[2] Dareste, *Etudes d'Histoire du Droit*, p. 137; and see on ancestor-worship generally, Cuq. i. 64; Fustel de Coulanges, *La Cité Antique*, Book I., ch. 1; Maine, *Ancient Law*, ii. 185.

future happiness would depend. No duty was so sacred as the exact and punctilious attention to the claims of his priestly office as head of the family.[1] The extinction of the family was a thing to be regarded with horror. The duty of the young patrician was to marry as soon as possible in order to perpetuate the family, that his ancestors might not be left in misery on account of the cessation of the family *sacra*. The anxiety to prevent the extinction of the family explains the great prominence given to adoption in early law. If the *paterfamilias* is childless, or if his children predecease him, it is a sacred duty to adopt a son to keep the family alive.

The Hindus believe that if the family rites are duly performed the ancestors are advanced from stage to stage. Only the other day the Privy Council had to decide the question : "Is it lawful to give an only son in adoption?" The argument was to this effect : "It is abominable for a father to give his only son to another. For as a consequence of the extinction of the family, and the cessation of the family rites, the father himself, after his death, will be left in *pūt* (hell). It might be replied that this was his own affair and affected nobody else. But this is not so. It affects his ancestors. If the rites had been duly performed by his son—and his action makes this impossible—he would be freed from *pūt*, his father would become immortal, and his grandfather would be raised to the solar system."[2] All this, except perhaps the rise to the solar system, would have sounded quite reasonable to a Roman in the early days of the city. And Sir H. Maine[3] says, "It sounds like a jest to say that according to the principles of Hindoo law property is regarded as the means of paying a man's funeral expenses, but this is not so untrue of the

[1] Gide, *Condition Privée de la Femme*, 21 ; Post, *op. cit.*, i. 130.
[2] *Radhamohon* v. *Hardai Bibi*, 26 Ind. Law Rep., p. 113 (1899).
[3] *Village Communities*, p. 53.

written law, concerning which the most dignified of the Indian Courts has recently laid down, after an elaborate examination of all the authorities, that 'the right of inheritance, according to Hindoo law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor.'"

Section 2.—Place of Patriarchal Family in Evolution of Society.

There has been much discussion in recent years as to the place of the patriarchal family in the evolution of society. The older writers, and notably Sir H. Maine, are of the opinion that the patriarchal family is one of the primitive institutions of the race. They regard our society as a gradual widening or extension of the family.

The patriarch governs his household, which includes his sons and his sons' wives and families. Such a family is an independent society by itself. It forms no part of any larger group. Its only king is the patriarch. The family of Abraham and other patriarchs as described in Genesis are looked upon as illustrating this theory. Most of the later writers, however, are disposed to the view that the patriarchal family is far from being the primitive form of society. The family indeed in the modern sense does not exist among many uncivilised peoples. Apparently the first stage is that at which mankind lived in the woods upon a level hardly higher than the brutes. As soon as kinship began to be thought of, a child was looked on as related to its mother, but not to its father. In fact it was generally impossible to say who was its father. After this stage, it is usual to find men organised into totem-groups or clans. The bond of union in these totem-groups is kinship or supposed kinship. The members of such a group bear the same name, have the same religious rites, and frequently claim descent from the same mythical ancestor. Notwithstanding this, it is common

enough to find many members of the group with whom the kinship is well known to be fictitious. They may be children adopted by members of the group from another group, or they may be captives of war who have been admitted to membership.[1] In many parts of the world the members of such groups are tatooed with the totem of the group. This is the figure of some animal or plant which is the object of worship ;—*e.g.*, the bear is the totem of the Mohawks. All the persons marked with the totem are kin. In this very early form of society, relationship depends upon membership of the same totem-group. And it is not inconsistent with this that it is generally impossible to demonstrate the relationship at all. The relationship is taken for granted. The two persons must be akin, because they have the same totem. And it is very common to find these clans or totem-families exogamous. This means that a man may not marry a woman of the same group. The question therefore at once presents itself: seeing that the father and mother belong to different groups, to which group are their children to belong? Different answers were given to this question. In many tribes the old opinion still prevailed that the only relationship to be considered must be on the mother's side. "Maternity," it has been said, "is a matter of fact ; paternity a matter of opinion." Accordingly the children were marked with the totem of the mother, and were looked upon as quite unrelated to the father's totem-group. In other groups, when perhaps a somewhat higher stage of morals had been reached, relationship on the father's side was recognised. The child bore the totem of the father. But it did not occur to early people to think that the child was related both to his father's and to his mother's kindred. It seemed to them that he must belong either to one totem-family or another. And if he belonged to the family of his father, he had no connection

[1] See Post, *Grundriss*, i. p. 116.

with the family of his mother, who bore a different totem.

It is known that among some races—*e.g.*, some of the North American Indians, the system of kinship by the female side has been superseded by that of kinship by the male side. It is maintained by many writers that this is the ordinary course of events, and that all races have passed through a stage at which the only kinship was that on the mother's side. This is a somewhat large assumption. There is no evidence for such a state of things among the Greeks and Latins, though it is not impossible that they may have passed through it.

Section 3.—Do Children belong to Father's Kin or to Mother's Kin?

The reason of the change from the one system to the other is somewhat obscure. It resolves itself into the question if the children of a man and a woman are to belong to the father's kin or the mother's kin. Children are the wealth of savages, and a group is interested in securing as many as it can. Among many tribes it is usual for the husband to go to live among the wife's kin, and to enter her group. Where this is the case it is natural that the children should belong to her kin also.

Elsewhere the custom is for a woman to go to live among her husband's kin. Here it would be more natural to find the children treated as of his kin. But it rather seems that the general view among early and savage races is that children belong to the wife's kin, unless they have been compelled to abandon their claim, or have parted with it for a consideration. Where bride-capture is practised, and the bride is carried away by force from her own people, they can hardly be supposed to retain any right in her children. And where bride-purchase is practised, the kin who sell the wife to the husband sell at the same time all rights in her future

children.[1] *E.g.*, among the Pueblos of Mexico society is still organised on the clan system. The descendants, real or supposed, of a common ancestor constitute a family group named after some animal or natural object, like the rattle-snake *gens*, the corn *gens*, and so on. Descent is reckoned only in the female line, and the children therefore always belong to the mother's *gens*. Marriage within the *gens* is not allowed. Each *gens* forms a separate village, sometimes of five hundred inhabitants or even more. They are all bound to defend one another. All the husbands being brought in from outside, and belonging one to one *gens* and another to another, have to fall in with the policy of the *gens* into which they have married. If one of them is aggressive, he is bound to have an immense majority against him, and only in very extreme cases will his own *gens* take up his quarrel.

Then we generally find tribes or clans which seem as if they might have grown out of these totem-groups. They have a clan home, and occupy generally a definite tract of country as hunters and warriors. It is only when these clans or totem-families give up being hunters and settle down on the land that the family becomes what Maine calls it—the unit of society. The clan must break up, and it naturally breaks up into smaller groups of those who feel themselves most closely united.[2] The primitive village is formed by such a settlement. And the primitive village is a group composed of the same members as the patriarchal family, and is, in fact, the patriarchal family. So that, according to a view for which there is a good deal of support, the patriarchal family is far from being the starting point in the growth of society. Rather is it a stage which society has slowly reached after many ages. The world is already pretty old at the dawn of Roman history.[3]

[1] See Wake, *Marriage and Kinship*; Post, i. 72. [2] Post, i. 124.
[3] See Post, *Grundriss*, i. 15, for a note of the literature upon this subject.

CHAPTER V.

Early Theories of Relationship.—Agnation.

Section 1.—Wife a Quasi-Daughter.

The importance for us just now of these theories as to the evolution of society lies in the light they throw on the early view of relationship at Rome. The only relationship to which any account was paid was relationship on the father's side. If a mother was considered as related to her children, this was only so upon a fiction that she had altogether given up her own family, and had passed into the family of her husband. This being so, she is looked upon as a quasi-daughter of her husband.[1] She is not related to her children as a mother, but is looked upon as their sister. She takes a daughter's share in the succession of her husband. Her children are related to her only on the theory that she is their sister, and they are not related to her family at all. A paternal uncle is a near relation, a maternal uncle is a stranger in blood. This is the theory of relationship called agnation, and it is undoubtedly a very puzzling and, to us, an extremely unnatural theory.

Section 2.—Who are Agnates?

Let me first state who a man's agnates were before considering the theory. All persons related to him by male descents, natural or fictitious, are his agnates, unless the tie of relationship has been broken by *capitis deminutio.* By

[1] Gaius, i. 118.

"fictitious descents" I mean that a wife *in manu*—a term to be explained later—is an agnate of her husband and of his agnates, just as if she were his daughter. And further we must bear in mind that all adopted children are treated by the law as exactly the same as children lawfully begotten. My brother's wife *in manu*, or my brother's adopted son, are just as much my agnates as is my brother himself.

And by the tie being broken by *capitis deminutio*, I mean that if my brother had emancipated his son—*i.e.*, had placed him outside his family, or if the son had been expelled from the family by suffering a penalty involving *capitis deminutio*, or "civil death," to use an expression roughly analogous, then in either case the son has ceased to be an agnate of his father or of me. He has become a stranger. And further, a woman when she marries, if she marries according to the régime of *manus*, ceases to be an agnate of her father, and becomes an agnate of her husband. His people become her people, and his gods her gods. A man's agnates therefore will be—(1) His father, paternal grandfather and great grandfather, if he is living; his paternal uncles and great-uncles; his paternal aunts and great-aunts, so long as they are unmarried. (2.) His mother, if she has been brought into the agnatic circle by *manus*, and his brothers and sisters by the same father, so long as the sisters are unmarried. (3.) His wife *in manu*; his sons, his sons' wives *in manu*, and their sons and unmarried daughters; his daughters till their marriage; and the sons and unmarried daughters of sons who have predeceased him. (4.) More remote collaterals through males—*e.g.*, a paternal uncle's son or grandson.

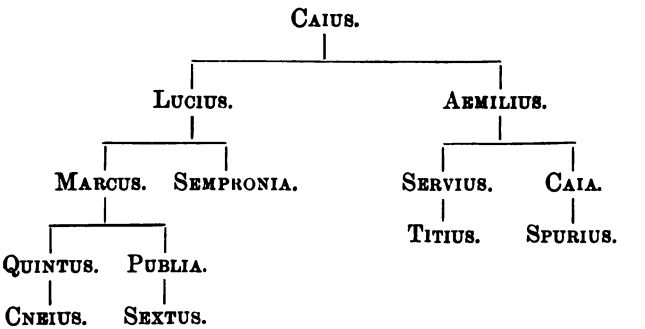
Section 3.—Examples of Agnation.

Among these groups group three is privileged. They are *sui heredes*, who have the first claim on the succession.

They are agnates, of course, but are preferred to other agnates. And two points must be kept clearly in view:

(1.) That persons who have come into the group by adoption are just in the same position as if they had been born in it; and

(2.) That an agnate ceases to be an agnate if he suffers *capitis deminutio*. As it is important to have a firm grasp of the system of agnation, it may not be amiss to give a simple genealogical tree:—



Here Caia, who is a paternal aunt of Titius, and was therefore his agnate, has ceased to be so by her marriage (assuming *manus*), and is no longer related at all to him or to her father Aemilius, or to her brother Servius.

Sempronia, being unmarried, is still an agnate of Titius or of Cneius.

Sextus and Spurius, who descend through females, are not agnatically related to Caius, or to any other members of the group. For their mothers passed altogether out of this group when they married.

Wherever in the pedigree we come to the name of a married woman, we can strike it out, as well as the names of her children. She and her descendants belong to another family altogether—viz., to the family of her husband.

At the death of the *paterfamilias*, his sons and his un-

married daughters become independent, freed from the *potestas*, or, to use the technical expression, *sui juris*. And grandchildren become *sui juris* if their own father is not living. If he is living they simply exchange the *patria potestas* of their grandfather for that of their father. But in the case of sons and of unmarried daughters, each of them becomes a *paterfamilias*, or a *materfamilias*, at the death of the head of the family. Each of them, that is to say, becomes the head of the family, because he or she ceases to be subject to any other head. If the son dies unmarried his family dies with him, as it never included anybody but himself. And in the case of a daughter her family always dies with her if she never marries, and it is extinguished during her lifetime if she marries. For by her marriage she is, in the language of some of the jurists, born again—undergoes a regeneration—into the family of the husband. This is the explanation of the maxim, "*mulier familiæ suæ et caput et finis est.*"[1] Another mode of explaining agnatic relationship is this: Suppose we frame a genealogical table of the descendants of some celebrated man, let us say of Oliver Cromwell. All of these descendants will be cognates of each other. But it would only be those who are Cromwells whom the Romans would have reckoned as agnates. The married daughters have changed their name and their children are not Cromwells.

Section 4.—Agnates and Gentiles.

But if agnates are all those persons related by male descent from a common ancestor, what is the difference between agnates and *gentiles?* For a *gens* is just a clan composed of persons bearing the same name and claiming common descent in the male line. That a difference was made in pretty early times is shown by the law of the

[1] D., 50, 16, 195, 5.

Twelve Tables. A man's succession is to go—(1) to *sui*, (2) to agnates, and (3) to *gentiles*.

Now at what degree of relationship do we say that the class of agnates is to close, and the class of *gentiles* to open? This is a vexed question. According to many writers anyone who was able to prove his relationship in the male line with the deceased could claim as an agnate.[1] Failing any such person the estate went to the *gens* or clan to which the deceased belonged. Agnation and *gentilitas* were the same thing. All agnates were *gentiles*, and all *gentiles* were agnates. But many of the *gentiles* were so far removed in blood from the deceased that the relationship was impossible to trace. The common name and the common religious rites showed that it must exist. But the tie was so distant that it was impossible to prove it. For purposes of succession a line had to be drawn. If a *gentilis* could prove his relationship he was preferred to the *gentiles* who were unable to bring such evidence. He was an agnate in a narrower sense.

According to another theory the line was drawn at a fixed degree of relationship. Agnates were all relations on the father's side up to and including the sixth degree. This is supported by an analogy from India where a similar line is drawn between *Sapindas* relations through males up to the sixth degree inclusive, and *Samanodocas*, or all those persons who bear the same family name.[2]

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[1] See Mommsen, *Staatsrecht*, iii. 16; Fustel de Coulanges, *La Cité Antique*, liv. ii. ch. x.

[2] See Hearn, *Aryan Household*, p. 168; Starcke, *Primitive Family*, p. 96; Muirhead, 2nd ed., p. 164; Karlowa, ii. 884, compares the distinction in old German law between the *Haus* and the *Sippe*. Among the Salian Franks a man's land descended to his sons. Failing sons it went to the village community, which at that time was composed of persons related or supposed to be related to each other. King Chilperic by an edict decreed that if a man left no sons his lands should go to his daughters, and failing these to brothers and sisters. It was only failing all these that the succession opened to the village community (See Brunner, *Deutsche Rechtsgeschichte*, i. p. 90).

What happened in the early Roman law when the *gens* succeeded is by no means clear. Did the *gens* succeed as a corporation and hold property for the general use of its members, or did the *gentiles* divide the estate? We have no information upon this point, and in fact the gentile organisation altogether is full of obscurity.

Some writers think that in the regal period no distinction was drawn between agnation and *gentilitas*. If a man had no widow and children his estate went to his *gens*.[1] When the plebeians were admitted to equal rights by the Twelve Tables the difficulty at once presented itself that they had no *gentes*. If a plebeian died unmarried, let us say, upon whom was his estate to devolve? To get over this difficulty they created the separate class of agnates, and according to some of these authorities, they drew a line at the sixth degree—*i.e.*, at second cousins. All relations through males within the sixth degree inclusive were agnates. Those of the seventh degree or more remote were *gentiles*. And having made this rule they applied it to the patricians as well as to the plebeians. There is no textual authority for this, and it strikes me as a somewhat improbable assumption. Even before the Twelve Tables if a man left, let us suppose, brothers and sisters surviving him, one would hardly expect them to be excluded from his succession in favour of a body so vaguely connected with him as the *gens*. And it is rather curious that a rule introduced, *ex hypothesi*, to place patricians and plebeians upon the same footing should first alter the order of succession to a patrician by introducing this new class of agnates, and should after all leave the patrician and plebeian subject to a different law. For if the patrician died and had no *sui* or agnates his succession devolved on his *gens*; whereas if a plebeian left no *sui* nor agnates his succession was vacant.[2] It seems to me more likely that

[1] Muirhead, 2nd ed., p. 43.

[2] *Ibid.* p. 164.

persons able to prove their agnatic relationship were from a very early time preferred to the *gens*.[1]

Section 5.—Upon what does the Theory of Agnation rest?

The commonly accepted view is that agnation is a principle of relationship based on the Roman *patria potestas*. The best-known English exponent of this view is Sir Henry Maine. "The foundation of agnation is not the marriage of father and mother, but the authority of the father. In truth, in the primitive view, relationship is exactly limited by *patria potestas*. Where the *potestas* begins kinship begins, and, therefore, adoptive relatives are among the kindred. Where the *potestas* ends kinship ends, so that a son emancipated by his father loses all rights of agnation. And here we have the reason why the descendants of females are outside the limits of archaic kinship."[2]

But there are many difficulties about this theory.

If agnation rests on *patria potestas* why does it not cease when the *potestas* ceases? If a *paterfamilias* dies leaving two sons, and each of them has a son, why are these cousins agnates. They are not, and have not ever been, in the same *potestas*. In the case of a large household with children, grandchildren, and great-grandchildren, why might it not happen that a woman descendant married within the *potestas*? And if she did so, why should her children not be agnates? Yet we know that the children of women were always excluded.[3] This last difficulty may, perhaps, be explained by assuming that marriage within the *potestas* was forbidden.[4] Schulin says, founding on Tac. Ann., 12, 6, that from the earliest time the marriage of relations within the sixth degree was forbidden.[5] The theory of Mr. M'Lennan

[1] See Voigt, *Jus Naturale*, iii. p. 1163 *seq.*
[2] *Ancient Law*, p. 149.
[3] See M'Lennan, *Patriarchal Theory*, p. 192.
[4] Cp. M'Lennan, *ibid.*, 207.
[5] *Lehrbuch*, 176, 204.

as opposed to that of Sir H. Maine is that agnation as a principle of relationship rests on the *gentile* organisation. In early times all the members of a *gens* were kin, and no member of one *gens* could be related to a member of another *gens*. They were mutually exclusive circles of kindred.

The *gens* was exogamous. A woman if she married passed into another *gens*, and therefore she and her descendants are lost to the *gens* of her birth. A male member of the *gens*, if he marries, brings his wife into his *gens*.

I am inclined to think this is a more probable theory than the other.[1]

Section 6.—*Cognatio.*

In opposition to this ancient Roman conception of the agnatic family comes that of relationship by blood, whether on the father's or the mother's side. This, is *cognatio*. As we shall see when we come to study the development of the law of succession, the cognatic rule—*i.e.*, relationship as we now understand it, finally supplanted the agnatic rule of relationship on the father's side only. In the law as it was finally settled by Justinian, everything depends upon cognation.

The same evolution is seen in many primitive races. In fact the usual development seems to be that, first, the only relationship recognised is entirely on the mother's side; next, entirely on the father's side; and lastly, on both sides.[2]

[1] See M'Lennan, *Patriarchal Theory*, especially p. 205 *seq.*, and cp. Post, *Grundriss*, 121 *seq.*

[2] Post, *Grundriss*, 69.

CHAPTER VI.

EARLY LEGAL PROCEDURE.—THE OLD *LEGIS ACTIONES.*

Section 1.—*LEGIS ACTIO SACRAMENTO.*

THE earliest form of legal procedure and the parent of our revendication is the action which came to bear this name. It did not begin with any summons except an oral one. The plaintiff had to find his man, and by word of mouth solemnly call upon him to accompany him before the judge —in the earliest time the king, later the consul, and still later the prætor. This oral summons was called *in jus vocatio.* If the defendant declined to come, the plaintiff calls witnesses to take note of his refusal, and he may then hale him by force to the Court. This was called *manus injectio.* If no witness is available, he may, after calling on the defendant and being refused, put a notice on the door of his house. He is then entitled as before to proceed to *manus injectio.* But the defendant may, if he cannot conveniently go in person, produce a satisfactory representative —*vindex*—who takes his place in the proceedings and binds him. And if the defendant cannot be got hold of, the prætor may give the plaintiff the right to seize his goods.[1] When they get before the judge, the plaintiff states orally the nature of his complaint. This is *editio actionis.* The defendant will, probably, require time to prepare his defence, and the judge fixes a future day for further proceedings, and makes the parties solemnly engage to appear

[1] Maynz, *Cours de Droit Romain*, 5th ed., vol. i. p. 506.

on the day fixed. In general the defendant had to find sureties—*vades*—for his appearance. From this the engagement to appear got the name *vadimonium*. On the day of trial the parties appear together before the judge. Each of them carries a *festuca* or rod, which stands for a spear—*quir* or *hasta*. This was itself, Gaius tells us, the symbol of ownership. To take the instance Gaius gives: suppose the action is one to recover from the defendant a man who is alleged to belong to the plaintiff. Remember that a man's wife and children are his property, and they, as well as his slaves, may be recovered from anyone who is wrongfully detaining them. The plaintiff taps the man on the shoulder with his *festuca*, and repeats the following form of words: "*Hunc ego hominem, ex jure Quiritium, meum esse aio (secundum suam causam) sicut dixi, ecce tibi vindictam imposui.*" By *secundum suam causam* Gaius means that the plaintiff must here state in what character he claims the man—*e.g.*, must say the man is his *filius-familias* or his slave, &c., as the case may be. This claim made in this set form of words is the *vindicatio*. If the defendant makes no reply, judgment —*addictio*—is given forthwith for the plaintiff. If, however, the defendant contests the ownership, he likewise touches the man with his *festuca*, and makes the *vindicatio*. When the *contra-vindicatio* is made there is *manus consertio* —joinder of issue. Then comes the stage of the *sacramentum*, from which the action takes its name. *Sacramentum* means, primarily, an oath, and is in fact the word from which "*serment*" is derived. It is very likely that at first the parties swore by the gods that their contentions were just, and that the money forfeited by the loser was a peace-offering to the offended deity. At the period about which we have information, the plaintiff says, "I challenge you with 500 *asses* (*i.e.*, pounds of copper) to make good your claim"—"*D æris te provoco.*" The defendant replies, "*Similiter ego te.*" The stake is then deposited *in sacro*

under the charge of the pontiffs. It remains there pending the trial. At the end the winner got back his stake, while that of the loser was forfeited, originally to the pontiffs for religious uses, later to the treasury. Ihering[1] points out what a hardship to a poor litigant such a system was. A poor plebeian comes back from the war and finds that his father has died during his absence, and that the little paternal farm has been seized by his patrician neighbour. He has not 500 *asses* in the world. How can he raise the *sacramentum?* He cannot borrow it, for the only security he could offer is precisely the few acres in dispute. This obvious grievance was partly met by the *Lex Papiria* (*circa* B.C. 246). This made it enough for the plaintiff to find sureties—*prædes sacramenti*—for the payment of the *sacramentum* in the event of want of success. But this was long past the early period, as to which Ihering's criticism seems very just. When the *sacramentum* had been handed over, the magistrate gave interim possession—*vindicias dicere*—to one of the two, making him find sureties—*prædes litis et vindiciarum*[2]—to restore it with the fruits for the interim period, if he were ultimately unsuccessful. Owing to a lacuna in the MS. of Gaius, the subsequent procedure is very doubtful. The magistrate before whom the ceremony I have been describing took place did not decide on the merits of the dispute. He remitted it to another Court. In early times the remit was probably to the Centumviral Court of 100 jurymen, about which very little is known. Earlier still the remit was probably to the pontiffs.[3] In more modern times the magistrate remitted to a *judex* or arbiter agreed on by the parties. The formal question for trial was, "Is the sacrament of A. just?" but its answer, of course, involved the merits. Before the magistrate the proceedings

[1] *Scherz und Ernst in der Jurisprudenz*, 175; and see Muirhead, App., Note D.

[2] *Vindiciæ* means the thing vindicated and its fruits. [3] Cuq. i. 412.

were said to be *in jure*. Before the arbiter they were *in judicio*. The act of remit was called the *litis contestatio*—the calling to witness of the cause,—because originally the parties called on those present to witness what was the issue which was being sent to trial.

When the subject in dispute was not a thing which could be brought into Court—*e.g.*, was a field, the plaintiff's *vindicatio* was, "I say that such and such a field is mine, and I call upon you to go there and join issue with me before the magistrate"—*in jure manum conserere*. The parties then repaired with the magistrate and with their backers to the ground, and there go through the ceremony of the *vindicatio* and the *contra-vindicatio*. They then return to the Court, and go through the ceremony of the *sacramentum*. At a later period they obviated the inconvenience of this procession to the land, which might be a great distance away, by bringing a turf from the land in dispute. This was accepted as a symbol of the land, and when the magistrate ordered the parties to go to the land they produced the turf, and each of them laid his *festuca* upon it instead of upon the actual field. Perhaps they had other similar symbols, such as a tile for a house. As time went on, as Muirhead suggests, the convenience of this plan would commend itself, and probably no particular inquiry would be made as to where the turf came from. A few sods and tiles would be kept at the Court to do duty when required.[1]

The whole procedure of the *actio sacramento*, primitive as it is, is a symbol of a procedure still more primitive which it had replaced. Behind it we see a period when the appeal was made not to the civil magistrate, but to the gods, whose will had to be interpreted by the pontiffs. Still earlier we see that the appeal was to the strong hand. The vindicant

[1] Muirhead, 2nd edition, p. 179.

and the counter-vindicant, who now lay their rods upon a symbolical turf as part of an antique ceremonial, decided in a simpler age their right to the land by single combat.

The *actio sacramento* was the general form, and was applicable in all cases where no other was prescribed—*e.g.*, in claims to property, wife, son, to a servitude, &c. In certain cases other forms are appropriate.

Section 2.—*Per Judicis Postulationem.*

This seems to have applied to small cases when the sum in dispute was less than 50 *asses*, which was the minimum *sacramentum*. The scale was 500 *asses* if the value of the thing claimed exceeded 1000 *asses*; if less it was 50 *asses*. Now if a man claimed 25 *asses*, say, as a fine for an assault, it would be absurd to make him advance twice as much as a stake.

Perhaps the *actio per judicis postulationem* applied also to other personal claims in which the sum to be awarded had to be assessed by the Court. And it has been suggested, with some probability, that in divisory actions in which neither party loses it would be grossly unjust to make either of them forfeit a sacrament, and that therefore the *postulatio judicis* was applicable in such cases. Where it was available, the plaintiff had the right to ask for a remit to a judge, without going through the preliminary sacramental procedure.

Section 3.—*Legis Actio per Condictionem.*

This is of later date. It was introduced by the *Lex Silia* of uncertain date.[1] It was a right given to the plaintiff who sued for a fixed and definite sum of money to give formal notice—*condictio*—to his opponent to appear on the 30th day thereafter for the appointment of a judge. It was a

[1] Gaius, iv. 19.

peculiarity of this action that when the sum claimed was *pecunia certa* the plaintiff might call on the defendant who disputed liability to pay one-third more than the debt if judgment went against him. He himself had to undertake to pay the same penalty if he lost his action. These engagements were called *sponsio et restipulatio tertiæ partis.* By *pecunia certa* at the time of the *Lex Silia* was meant only money lent on a loan. But the same procedure and penalty was extended later to debts arising under a *stipulatio,* or under the literal contract.[1]

The other two so-called actions of the law are really forms of execution, one against the person and the other against the property of the debtor.

Section 4.—*Per Manus Injectionem.*

This was a right of summary execution against the person of a debtor whose debt was indisputable. It applied specially to debtors who by the old contract called *nexum* had given their creditors the right, if the debt was not paid, to seize them and keep them in bondage.

Section 5.—*Per Pignoris Capionem.*

This was a right of summary execution against the property of a debtor in certain cases. *E.g.,* the publicans who farmed the taxes had the right to seize the property of persons who were in arrears with their taxes.

About all these old forms of procedure, except that of the *sacramentum,* our information is very scanty from the defective state of the MS. of Gaius, who is, practically, the only authority.

[1] Cuq. i. 668.

CHAPTER VII.

EARLY FORMS OF CONVEYANCE.—*IN JURE CESSIO* AND *MANCIPATIO.*

Section 1.—*IN JURE CESSIO.*

THE early forms of conveyance are as cumbrous and ceremonial as the legal process. In fact one of the earliest, if not the earliest conveyance, is a simulated action. The seller agrees to allow a judgment to be pronounced by a Court in which it is found that the buyer is the owner. The old English law had a similar conveyancing device [1] called fines and recoveries. The *in jure cessio* was just the sacramental action cut short. The defendant instead of making a counter-vindication and so joining issue with the plaintiff allows the plaintiff *vindicatio* to be pronounced, while he says nothing in reply. Whereupon the magistrate applying the rule *confessus pro judicato habetur* pronounces the thing to belong to the plaintiff. It was found so convenient that it was used :—

(1.) For transfer of property.
(2.) For manumitting a slave.
(3.) For emancipating a son.
(4.) For adopting a son.
(5.) For assigning a *hereditas en bloc* before entry (see Gaius, ii. 35).
(6.) For assigning the tutory over a woman.
(7.) For creating a servitude.

[1] See Blackstone, ii. 349.

Section 2.—MANCIPATIO.

Next to *in jure cessio* the earliest form of conveyance is *mancipatio*. It is a curious and picturesque little ceremonial. The parties must call a weigher—*libripens*—who brings with him his scales and copper weights. *Mancipatio* is often called the ceremony of the copper and the scales, *quod per aes et libram geritur*. They must also summon five witnesses—adult male citizens. The *libripens* was, very likely, originally a private citizen merely acting like the five witnesses to oblige the parties. Later he seems to have been a public official whose duty it was to lend his services and his scales when called upon. The buyer in the presence of the *libripens*, the seller, and the five witnesses lifts the thing in his hand or seizes it—*rem tenens*—and pronounces a formula called the *nuncupatio*. The words are not preserved in their entirety. He says, "*Hunc hominem ex jure Quiritium meum esse aio isque mihi emptus sit hoc œre, œneaque libra.*" Here he states the price. He then struck the scales with a piece of copper—*rauduscŭlum*—and handed the the bit of copper to the seller. The transaction was then complete. But the property did not pass unless the price was paid or the seller accepted some equivalent.[1] If the thing sold was a piece of land, or a thing like a ship, which could not be taken up by the hand, it was sufficient to describe it. It was not necessary in mancipating land to go to the spot, nor were symbols used as in the *vindicatio*. Where, however, moveables were transferred, it was only as many as could be seized at once which could be mancipated together. From a document found lately at Pompeii we find that even in the first century A.D., it was necessary in mancipating several slaves to go through the ceremony separately for each.[2] Gaius calls mancipation *imaginaria venditio*, and in his time, and for many centuries before, the ceremony of

[1] Girard, *Manuel*, 283.

[2] See Girard, *Textes, de droit-romain*, 738.

the weighing was a mere piece of formality. But originally it was the actual weighing of the price in bars of raw metal. It must have come into use when bars of metal were the medium of exchange. Earlier still cattle had been the medium. When coined money was introduced it was not necessary to weigh the price, but to count it. But the old form of sale was retained. It had peculiar effects which made it valuable, even after it ceased to be the only form by which sale could be effected.

(1.) If the buyer was evicted because it turned out that the seller was not the owner, he had an action *en garantie* called the *actio auctoritatis*, by which he could compel the seller to restore to him double the price stated at the mancipation.

And (2) if land had been mancipated and declared to be of a greater extent than it actually was, the buyer had an action *de modo agri* for twice the value of the extent wanting.

Mancipation belongs to the old civil law, and it was confined to Roman citizens and to Latins or peregrins [1] who enjoyed the *commercium* in virtue of a treaty. And certain things could be validly transferred only by *mancipatio*. These were the *res mancipi*, or mancipation-things. *Res nec mancipi* might be alienated without mancipation. This ancient division of property into *res mancipi* and *res nec mancipi*, which lasted for 1000 years, probably owes its origin to the Servian census. When Servius decided upon his census, it was necessary to prepare an assessment-roll. But it was only to include a man's real property and its appurtenances. Some rule had to be fixed as to what evidence the assessors might accept in proving that a man had validly alienated his farm. Servius laid down the rule that no alleged *inter vivos* disposition of a man's

[1] *Ulp.* xix. 4.

estate, or, at anyrate, of that part of it which had to be assessed, should be accepted as valid unless the transfer had been made either publicly in Court by *in jure cessio*, or before five witnesses by *mancipatio*. He did not invent the ceremony. It was the immemorial form of sale among the Romans. What he did was to declare that certain kinds of property must not be alienated, except by one or other of these public forms of conveyance. Many authorities think that the five witnesses symbolise or represent the five classes into which Servius divided the people. Mancipation would thus be an act performed before the whole people through their representatives. But this theory is almost certainly erroneous, for (1) we find mancipation employed by the Latins who had not the Servian classification, and (2) Gaius says that there must be not fewer than five witnesses—*non minus quam quinque testibus*.[1] He could hardly have expressed himself thus if there had been any magic about the number five. It seems to us now a large number of witnesses to require, but we must remember that mancipation belongs to a period before writing. Out of five witnesses there was a likelihood that enough would survive to bear testimony in the event of the sale being challenged before the buyer's title had by prescription become unassailable. It was a kind of primitive registration. Like the law of registration in countries which register titles to immoveable property, it applied only to certain property which was regarded as the most important kind, and like registration it attempted to secure that the ownership of this property shall be publicly known.

Section 3.—What Things were *res mancipi*?

1. Real property in Italy, whether houses or farms—*prædia urbana vel rustica*.

[1] Gaius, i. 119.

2. Slaves.

3. Native beasts of draught or burden—*quadrupedes quæ dorso collove domantur;* horses, oxen, mules, asses. One German theorist—Huschke—thinks each of the Servian classes may have had a special animal of this kind. As unfortunately only these four animals are mentioned, he boldly invents a fifth—the *bovigus*—from his inner consciousness.[1] Huschke thought first that the *bovigus* guided the plough by its tail, but, in a later work, he comes to the conclusion that it was by its proboscis. As the animal never existed except in the mind of Huschke, there is a wide field for speculation.

Camels and elephants which were imported into Italy at a later date, were not *res mancipi.* There was an old controversy as to whether an animal such as an ox was a *res mancipi* from its birth, or only from the time when it was broken in.[2] The former theory, supported by the Sabinians, was that which ultimately prevailed.

4. *Servitutes prædiorum rusticorum;* such as rights of way, of carrying water, &c.

All other things were *res nec mancipi.* We see that the *res mancipi* were practically the homesteads and the instruments—slaves and cattle—by which the farm was worked. The reason provincial land was not included was, that it did not belong to private citizens. It was owned by the state.

Section 4.—Fictional Uses of Mancipation.

Mancipation was employed for various purposes besides that of genuine sales. As I shall explain later, it was resorted to as a way of contracting marriage. In *coemptio* the husband and wife sold themselves to each other by mancipation. It was employed for emancipating a son, or for

[1] See Ihering, *Scherz*, p. 192.

[2] Gaius, ii. 15.

giving him in adoption, and for contracting a nexal loan in which the borrower became bound to become a bond-servant of the lender, if the loan was not duly repaid. And lastly it was employed for making a will. The testator went through the form of selling his estate to a friend who was charged with the trust of dividing it after the testator's death according to his instructions. So that to the enumeration of *res mancipi* we might add.

5. A freeman or freewoman who if they can be sold at all are to be sold by *mancipatio;* and,

6. The *familia* or estate sold *en bloc* for the purpose of making a will.

But (5) and (6) are fictional *res mancipi*, not thought of when the division was first made for the Servian census.

Res mancipi were to be alienated only by *mancipatio.* Probably in the time of Servius mancipation was the customary form of sale, whatever might be the nature of the thing sold. But as commerce increased it seemed a very cumbrous ceremony, and it became usual to recognise that as to *res nec mancipi*, when the parties had agreed to the sale and the seller had delivered the thing to the buyer, and the price had been paid, nothing further was required to pass the property. The weighing and witnessing were not needed. Still later even when a *res mancipi* had been transferred in this simple way, the prætor prevented the seller from trying fraudulently to get the thing back. Gradually the distinction between *res mancipi* and *res nec mancipi* became of less importance. Protected by the prætorian equity, the buyer who had got his *res mancipi* was secure, though it had been sold to him without the old ceremonial. Finally Justinian abolished the distinction altogether.

Section 5.—Mancipation of a *Res nec Mancipi.*

There is an old controversy as to the effect of mancipating a *res nec mancipi.* It was not necessary. The thing could

be sold by mere delivery. But if the seller chose to go through the ceremony, was the sale a good sale? In other words, was *mancipatio* incompetent except as to *res mancipi*? Some authorities (*e.g.*, Girard, p. 283) think that it was. If, however, as I think, mancipation was simply the old form of sale for all articles, it is likely enough that it was often employed even for *res nec mancipi*. Why should the *libripens* and the witnesses impede the legal effect of the delivery and the payment of the price? For, be it observed, the essentials of a valid transfer of property in *res nec mancipi*—viz., the agreement of the parties, the delivery of the thing, and the payment of the price are all present in *mancipatio*. It seems therefore unreasonable to maintain that the property was not transferred because something more was done than the law required. One would think that the rule would apply *superflua non nocent*.

Section 6.—CUSTOM SOLE SOURCE OF LAW IN REGAL PERIOD.

We must then conceive of the Romans during the regal period as a pastoral people, living according to customary law, worshipping their ancestors, investing the *paterfamilias* or patriarch with a remarkable degree of authority, recognising no relationship on the mother's side, and excluding from political rights a large and ever-growing number of outlanders. During this period, custom is the chief, if indeed it is not the only source of law.

It is very doubtful if there was any genuine enacted law of a general character. The *comitia* passed laws. But they were like private acts of parliament—*e.g.*, permitting the adoption of a citizen who was himself the head of his family (*arrogatio*), or allowing a citizen to make a will. We hear, it is true, of certain so called "royal laws"—*leges regiæ*—which were collected by Papirius, and are known under the name of the *Jus Papirianum*. But it is agreed that this collection is of much later date than the kings, and by some

it has been put as late as the end of the Republic. The compiler who put together fragments of early law assigned this to Romulus and that to Numa according to his fancy. These fragments deal exclusively with rules of ritual, and such matters as insult to parents, transgressing of boundaries, &c., into which the religious element largely entered. In fact the title of the *Jus Papirianum* seems to have been *de ritu sacrorum.* It was the vulgar belief that all the institutions of the law must have been introduced at some time or other by statute. So Dionysius says that Romulus established the family and the *patria potestas,* though nothing is more certain than that these formed part of the customary laws.[1]

[1] See Ferrini, *Storia dell Fonti,* p. 2.

CHAPTER VIII.

The Servian Reforms.

Section 1.—The Census.

To the end of the Regal Period belongs the important constitutional reforms which are attributed to Servius Tullius —the last but one of the kings. Cicero says that Servius owed his accession to the Plebs, and was determined to give them a share in the government. It must, however, apart from such personal considerations, have been becoming impossible to exclude from all political rights a body of men probably already equal in numbers to the privileged Burghers. It was, moreover, by no means the desire of the Burghers that the Outlanders should escape their share of taxation, or should not be liable for military service. And it was not in the nature of things that the Plebeians would be satisfied to go on paying the taxes and fighting the battles of Rome without having a voice in the government of the city. In order to arrive at a basis for a rearrangement of the taxes, a census was established. Every independent citizen was compelled, on pain of loss of freedom, to declare his name and age, and those of his wife and family, and the value of his real estate (*res mancipi*).[1]

Section 2.—*Comitia Centuriata.*

Upon this freehold qualification Servius divided the citizens, patrician and plebeian alike, into five classes.

[1] Muirhead, p. 63.

The patricians were the chief landowners, and it suited them to make political rights depend upon a real property qualification. Moreover, it was seen that by judicious distribution of voters in the classes, the patricians would manage to secure a majority. If they were no longer to rule by virtue of birth, they might still do so by virtue of wealth.

According to the tradition

Class	I.	consisted	of	those	who had	100,000 *asses;*
,,	II.	,,	,,	,,	75,000	,,
,,	III.	,,	,,	,,	50,000	,,
,,	IV.	,,	,,	,,	25,000	,,
,,	V.	,,	,,	,,	11,000	,,

according to Livy, i. 43, or 12,500 according to Dionysius, iv. 16.

The classes were divided into centuries. The first class had 80 centuries; the second, third, and fourth classes 20 centuries each; and the fifth 30 centuries. With some additional centuries of musicians and craftsmen, and 18 centuries of knights or cavalry, there were in all 193 centuries. The values given by the historians in *asses* or money represent, in all probability an older valuation in land. Possibly the scale was twenty acres or more for Class I., fifteen acres for Class II., and so on. There is no doubt that the arrangement was intended to give the rich man a higher voting power than the poor man. Cicero says the idea was *ut suffragia non in multitudinis, sed in locupletium potestate essent*,[1] and *is valebat in suffragio plurimum cuius plurimum intererat esse in optimo statu civitatem.* As we might put it in modern phraseology, a man's political weight was to be in proportion to his "stake in the country." It is an argument which seems to have less power to convince than formerly. Class I.

[1] *De Republica*, ii. 22, 39. Karlowa, i. 74. [2] *De Rep.* ii. 22, 40.

so much overshadowed the other classes that it was called the "class" par excellence; the members of the others being described as *infra classem*. With its 80 centuries and the 18 centuries of the cavalry, Class I. had a majority of the 193 centuries. In the voting the Knights voted first, and then Class I. If they agreed there was a majority, and it was unnecessary for the other classes to vote at all. It is clear that the rich had a preponderating weight, but the exact way in which this was secured is one of the most obscure problems of Roman history. If the centuries were equal in size, it is inconceivable that the richest class should have the most centuries. And Cicero expressly says that every century in one of the lower classes contained almost as many citizens as the whole of Class I. So that it seems necessary to assume with Niebuhr that the value of a man's vote varied in some way in proportion to his property qualification.[1] The vote of the man with a hundred acres must have counted for more than the vote of the man with five acres.

This division of the people by Servius was at the same time military and political. The classes and the centuries were divisions made for military purposes also. Together they formed the army, and when met for political purposes they are called sometimes *exercitus urbanus*. As a political assembly, this new assembly of Servius Tullius—the *Comitia Centuriata*—was the nation in arms met to vote. It became the great constitutional assembly, and the old patrician assembly of the *curies* ceased to have any real importance. The *Comitia Centuriata* was called together to pass laws, to elect magistrates, to decide on peace and war, and to act as the supreme court of appeal in questions involving the civil death or loss of *caput* of a Roman citizen. Every citizen had by the *Lex Valeria*, which is said to have

[1] Karlowa, i. 74.

been passed in 509 B.C.—the first year of the Republic—the right of appeal against a capital sentence to the assembly—*provocatio ad populum.*

When the *Comitia Centuriata* met to exercise its legislative functions, it was summoned by a magistrate who had the authority to command the army, and so usually by a consul. An announcement of the law to be proposed—*promulgatio rogationis*—was made seventeen days (*trinundinum*) before the day fixed for the *comitia.* On the morning of the appointed day, the magistrate who was to preside pitched a tent outside the city to take the auspices. In this he was assisted by the Augurs. If there was a thunderstorm, or if the auspices were otherwise unfavourable, the assembly was deferred. If they were favourable, it was supposed that the gods favoured the measure to be proposed. The subsequent vote was both *vox populi* and *vox dei.* If the *Comitia* was to go on, there was a new summons by trumpet call—*vox tubæ*—and the *Comitia* came out usually under arms; for it was still regarded as the army. A flag was hoisted on the Janiculum. When the order was given "*Ad Comitia,*" the army marched out to the *Campus Martius,* it being illegal to meet within the city. Even when assembled, the *Comitia* would break up if a thunderstorm came on, or if anyone was seized with an epileptic fit—*morbus comitialis.* There was no discussion in the *Comitia.* This must be done first in preliminary and less formal meetings called "*contiones.*" The presiding magistrate at the *Comitia* merely put the question, "*Velitis, jubeatis Quirites?*" If a majority voted for the Bill it became *populi jussum* but not yet *lex.* For a long time it needed the *auctoritas patrum* which probably means the ratification of the patrician part of the Senate.[1] But, to anticipate on this point, it was enacted by one of the *Leges*

[1] Karlowa, i. 46.

Publiliæ in B.C. 339, that for the future the *patres* should give their *auctoritas* in advance—*i.e.*, give *carte blanche* to the *Comitia*. After this the *populi jussum* was at once *lex*. Even before the *Lex Publilia*, the *auctoritas patrum* has become almost a formality.[1] And the *Comitia* itself is not to be compared with a modern Parliament. It was not an administrative body, nor even a debating chamber. It was only a way of getting a popular vote upon a question already decided upon by the Senate. The *Comitia* very rarely refused to pass a measure duly proposed. The magistrate who wished to propose a bill, first introduced it into the Senate, where it was fully discussed. The right of the Senate to be first consulted was admitted by constant practice. As a matter of theory, the magistrate might bring a bill directly before the *Comitia*. But this hardly seems to have occurred.[2] The law passed usually took its name from the magistrate who presided—*e.g.*, *Lex Publilia*, *Lex Sempronia*, *Lex Servilia*. Sometimes it was called after the two consuls for the year—*e.g.*, *Leges Valeriæ Horatiæ*. Occasionally a further descriptive title was given to it, especially when the presiding magistrate had already given his name to previous leges—*e.g.*, *Lex Sempronia judiciaria*, *lex Calpurnia repetundarum*. I have thought it convenient to explain here the nature and powers of the *Comitia Centuriata*, because its creation belongs to this very early period, and is referred by tradition to Servius. But it must be remembered that its legislative activity—if we can use that expression—was not till later. We are still in the reign of custom.

Section 3.—THE SERVIAN TRIBES.

According to the tradition, the division of the city into four tribes—*tribus*—was also the work of Servius. These

[1] For a summary of the opposing views as to the effect of the *Leges Valeriæ Horatiæ*, *Publilia*, and *Hortensia*, see Willems, *Le Droit Public Romain*, p. 180.

[2] Mommsen, *Abriss des römischen Staatsrechts*, p. 330.

tribes were local areas like municipal wards. There were four city wards and a varying number of suburban wards —*tribus rusticæ*. All real property—*res mancipi*—had to be enrolled for purposes of taxation in one or other of the tribes.[1] At a later period the tribal organisation came also to be used politically, and out of it grew the *Comitia Tributa*.

[1] See Bruns-Pernice in Holtzendorff's *Encyclopädie*, s. 12.

CHAPTER IX.

SECOND PERIOD—THE REPUBLIC.

Section 1.—THE CONSULS.

ER the expulsion of the kings, the regal power—*erium regium*—was placed in the hands of two consuls ted by the centuries for one year. Their position ered widely from that of a modern president of a republic, is intrusted with a certain number of powers carefully ted and defined. The Roman consuls held, so to speak, royal power in commission. They were joint-kings. their abuse of their theoretically absolute powers was cked first by their short tenure of office, and second by fact that each of them could block by his veto—*rcessio*—any official act of the other. *Melior est causa hibentis.* And as time went on the power of the consuls ıe to be greatly limited also by the increased strength of Senate. The Senate, in theory a mere body of advisers might counsel but not compel, came to get the complete trol of the public finances, and by their power over the se-strings obtained a commanding control over all the gistrates. And, as M. Girard observes, a permanent body h as the Senate naturally had much more authority over annually elected consuls than it had over kings who held ce for life, and who were, I may add, hedged about with ınctity which did not belong to the consuls.[1] The Senate lf had gradually undergone a change. The clans or

[1] *Manuel*, 19.

gentes had ceased to feel their separate political existence. They had merged together. It was no longer felt to be necessary that each senator should represent a particular *gens*. Even before the end of the regal period, the king chose anyone he liked to succeed to vacancies in the Senate.[1]

Section 2.—Consuls as Judges.

Moreover there were certain of the royal powers which were not carried over to the consuls. The king's powers as head of the Church passed to the *pontifex maximus*. And although the consuls remained vested with the royal judicial powers, it seems that they never had like the kings the right to hear and decide cases. Their right was limited to that of deciding if a relevant case had been stated, and if the necessary formalities had been complied with. This being so, they were bound to adjust the issue and send it for trial to a private citizen, chosen by the parties, and called the *judex*. Probably at first he had to be chosen from among the senators. This was the beginning of the famous distinction between *jus* and *judicium*. The preliminary proceedings before the magistrate were said to be *in jure*. The final trial of the issue was *in judicio*. It remained for ages a characteristic of Roman practice that the judge should be in principle a private citizen, not a state official, and should be chosen by the parties, though from a limited panel. Cicero says, "*Neminem voluerunt majores nostri esse judicem nisi qui inter adversarios convenisset.*" [2]

Section 3.—The Struggle for Equality.

In the early part of the republic is witnessed the long struggle of the *plebs* for political equality. After the centuriate organisation they were citizens entitled to vote, and a certain number of seats in the Senate were assigned to

[1] Mommsen *Hist.* i. 71.

[2] *Pro Cluentio*, 43. 120

them. The plebeian senators sat and voted, but could not speak. But for a long time the plebeians were ineligible for any of the magistracies. These officials frequently exercised their powers in a despotic way, and showed class spirit. The *Comitia* had no initiative, and could not even amend a bill sent down to it. It could only vote Aye or No. The Senate was the *probouleutic* body, and in it the patricians were the great majority. The patricians kept the public lands to themselves, and had great tracts which they farmed by gangs of slaves, many of them prisoners of war. The plebeian yeomen were continually being called out to fight. They had to leave their little farms untilled, or let the crops rot on the ground. Most of them were reduced to borrow at high rates from the patrician money-lenders, and under the harsh law of *nexum* found themselves prisoners for debt in the private prisons of their creditors. The sufferings of these *nexi*,—Roman citizens who had fought the battles of their country,—inflamed the passions of the *plebs* to fever heat.[1]

Section 4.—The First Secession.

At length, on returning from a campaign, the plebeian part of the army withdrew to a hill outside the city, afterwards known as Mons Sacer, and were joined there by many of their fellows from inside the city. They threatened to march away and found another city, unless their grievances were redressed. This was the First Secession, 494 B.C. The patricians had to make terms. The most important concession was that the *plebs* should have representatives called

[1] Livy, ii. 23. Livy describes how a brave soldier, an old man, escaped from his prison, and appeared in the forum squalid and pale. Worn to a skeleton, and with shaggy beard and hair, he looked like a wild man. *Fremebant se foris pro libertate et imperio dimicantes domi a civibus captos et oppressos esse, tutioremque in bello quam in pace et inter hostis quam inter civis libertatem plebis esse.*

Tribunes. They were to be sacrosanct, a great protection, for it made anyone who injured them an outlaw—*sacer*. They were not magistrates in the strict sense, for no *imperium* was delegated to them. Their most important power lay in their right of veto. If the tribunes agreed with each other, they could block the official act of any magistrate, even of the consuls.

Section 5.—THE *CONCILIUM PLEBIS*.

The *plebs* had so far been an unorganised rabble, which occasionally made itself felt when driven to desperation, but when the temporary end had been achieved lost all its cohesion. The tribunes organised this rabble into a political party. They began to call the plebeians together to public meetings—*concilia plebis*—at which the grievances of their order were discussed, and resolutions passed determining the policy of the plebeian party. For purposes of voting it seemed convenient to take the Servian division into tribes or wards. The resolutions passed at these *concilia plebis* were known as *plebiscita*. They were at first only binding on the plebeians themselves. But before long, by one of the *Leges Valeriæ Horatiæ* (B.C. 449), it was enacted that their resolutions should be of the same efficacy as those of the centuriate assembly—*i.e.*, should bind the whole people if they were ratified by the Senate—"*ut quod tributim plebs jussisset populum teneret.*" After that time, the *concilia plebis* became in fact another assembly, and after the *Lex Hortensia* (*circa* 288 B.C.), which removed the necessity of this confirmatory *senatusconsult*, the *plebiscita* were commonly called *leges* (See Muirhead, 2nd ed., p. 83).

Section 6.—COULD PATRICIANS VOTE IN TRIBES?

Seeing that the division of the people was by wards, it is difficult to resist the conclusion that a patrician freeholder

must have been entitled to vote in his ward. On the other hand some of the texts, including the Institutes [1] speak as if the *comitia tributa* consisted of plebeians only.[2] Perhaps the explanation is that for a long time the patricians were too proud to exercise their right of voting in an assembly where their order was in a great minority. At a later date, when the rivalry between the two orders had died down, they consented to take part in the tribal assemblies. But it rather seems as if there was always a distinction between a meeting of the *plebs* as a class and a political assembly of the tribes.

The first was called a *Concilium Plebis.* It was convoked by a tribune, and a patrician could not take part in it.

The second was a *Comitia Tributa.* It was convoked by a consul, and, in all probability, a patrician was entitled to attend.

The odd thing is that both bodies had legislative power.[3]

[1] *Inst.* i. 2, 4. [2] See Moyle, *Intro.* 20.

[3] See on this obscure question Mommsen, *Römische Forschungen*, i. 176.

CHAPTER X.

THE TWELVE TABLES.

Section 1.—THE DECEMVIRS.

THE reforms wrested from the patricians at the First Secession were regarded by the plebeians as an instalment of their rights. Many grievances still remained. In particular it was a hardship for them to be at the mercy of patrician magistrates who were restrained by no written law to which the plebeians could appeal. There arose a strong agitation among the plebeians for a codification of the customary law, or, at any rate, of so much of it as was necessary to protect them against arbitrary injustice at the hands of the magistrates. The leader of the plebeian party was C. Terentilius Arsa, a tribune. After eight years of struggle, in 454 B.C. a beginning was made by sending commissioners to Greece, or, as some think, to the Greek cities in South Italy, to examine and report on the laws in force there. Upon their return in 451 B.C., ten commissioners, called *Decemviri legibus scribundis*, were appointed. The patricians agreed to allow the constitution to be suspended, and the consular power vested for the time in the decemvirs; the plebeians for their part agreeing that the tribunate should be in abeyance. The whole power of the state was therefore vested in the decemvirs. They did their work with great rapidity, and by the end of the year 451 B.C. they had codified a great part of the law. Statutory effect was at once given by the *Comitia Centuriata*, and the new code was carved upon ten

tables, either of wood or of brass, which were set up for all to see in the forum.

Section 2.—Source of Law of Tables.

The work was, however, not complete, and the decemvirs were reappointed with some changes in the membership. In the following year they brought in a supplementary work which was confirmed as before, and set up on two additional tables. The Twelve Tables were for centuries regarded by the Romans with peculiar reverence. Livy calls them *fons omnis publici privatique juris*, and even in Cicero's boyhood, 400 years after their promulgation, the Roman schoolboys learnt to repeat the Twelve Tables by heart: "*a parvis, Quinte, didicimus 'si in jus vocat' atque alias ejus modi leges nominare.*" [1] And the Twelve Tables through all the changes of the law retained their statutory authority for nearly 1000 years. They were never repealed until Justinian's codification 948 years later. The tradition of the visit to Greece is likely enough to be true, but it is quite a mistake to infer that the decemvirs imported to any considerable extent into the Tables Greek or any other foreign laws. It is foolish to infer this from a few similarities which have been noticed between Greek and Roman law. Such similarities are only to be expected in the laws of two peoples so closely allied. As Puchta says, the similarities in the Greek and Latin languages are far more striking, yet no one suggests that commissioners were sent from Rome to bring in Greek words.[2] The Twelve Tables have not come down to us, and from the few fragments which we possess it is impossible to know exactly how far they were intended to form a complete code. It is probable that they took a great deal of the customary law for granted without re-enacting it, and only made declarations of the law upon points as to which

[1] *De Leg.* 2, 4, 9.

[2] *Inst.*, tenth edition, vol. i. s. 54.

questions were likely to arise. We possess only about 100 fragments, most of which are quoted by Cicero, Aulus Gellius, and Festus, the grammarian. Of these some forty purport to be in the original words of the Tables, the others only giving the effect of a provision said to be there contained.

Section 3.—Language of Tables.

It has been a favourite amusement of German *savants* to attempt from these scanty materials a reconstruction of the Twelve Tables. They have even formed a number of ingenious and archaic words and expressions in which to state the rules in those cases where the classical writers have given the sense but not the words of the Tables. There may almost be said to be an arrangement of the fragments which has become traditional. But it is extremely uncertain, and it rests upon two premises both of which are doubtful.

(1.) It is known that Gaius wrote a work on the Twelve Tables which consisted of six books. Of this we have some fragments. It is assumed that he followed the order of the Tables, and that each of his six books took in two tables. So that if Gaius speaks of divorce in his third book, we should infer that this subject[1] was in the fifth Table. But this assumption is quite gratuitous and in fact would lead to inconsistencies.

(2.) Of a few matters we are told that they were treated of in some particular table. It is assumed that the subject will be begun and ended on that table. But the Romans thought nothing of ending a table even in the middle of a sentence. This we know from other ancient tables which are preserved. In fact all these reconstructions of the Tables, from that of Jacobus Gothofredus in 1616 to that of M. Voigt in 1883, are made up largely of guesses.

[1] D. 48, 5, 54; Bruns, s. 16.

Section 4.—ILLUSTRATIONS OF TABLES.

Confining ourselves to the safe ground of the fragments which we have, we see that the laws are expressed in the fewest words, without any of the saving clauses and parentheses which load our Acts of Parliament. *E.g.*, *uti lingua nuncupassit, ita jus esto.* One can quite see how they might be learnt by heart—much more easily than we could learn the Bills of Exchange Act. I will give a few of the most important fragments:—

Si in jus vocat, ito. Ni it antestamino; igitur em capito.

If any one call on another to go with him to the Court, let him go. If he will not, let him call witnesses, and then let the summoner take him by force.

Si pater filium ter venumduit, filius a patre liber esto.

If a father sell his son three times, let the son be free from his father.

Uti legassit (*super pecunia tutelave*) *suæ rei, ita jus esto.*

As a man shall have declared his will with regard to his estate, so let the law be.

The words *super pecunia, tutelave* are, probably, a later interpolation.[1]

Si intestato moritur, cui suus heres nec escit, agnatus proximus familiam habeto.

If a man dies intestate, leaving no *suus heres*,[2] let the nearest agnate take his family estate.

Si agnatus nec escit, gentiles familiam habento.

If there is no agnate, let the clansmen take the family estate.

[1] Muirhead, second edition, p. 158.

[2] Note that it is not thought necessary to declare that his *suus heres*, if any, will take his succession. That elementary rule is left to rest as before upon custom.

Cum nexum faciet, mancipiumque, uti lingua nuncupassit ita jus esto.

When a man shall enter into a contract of *nexum* or mancipation, as he shall declare with his tongue so let the law be.

Si membrum rupit, ni cum eo pacit, talio esto.

If a man have broken the limb of another, and have not come to terms with him, let there be *talio* (*i.e.*, an eye for an eye, a tooth for a tooth).[1]

This last is a remnant of really primitive law. If we are to take it literally, it means that in the case of a broken limb, the injured party has still the right of private vengeance if he chooses to exercise it. The law does not yet compel him to take a money compensation.[2] But more likely *talio* has ceased to mean literally the eye for an eye. Suppose a man has had his leg broken, he goes to the Court and claims *talio*. The judge decrees *talio*. But he does not send an officer of Court to break the defendant's leg; he fixes a money penalty. And the defendant can insist on this.[3] *Si reus, qui depacisci noluerat, judici talionem imperanti non parebat, æstimata lite judex hominem pecuniæ damnabat.*[4]

In some cases the *talio* was fixed. A broken rib or head had a definite fixed value, as it had among the Saxons. At Rome a freeman's bone was worth 300 *asses;* a slave's only half as much. For *injuria* or insult the *talio* was 25 *asses*. From the change in the value of money these fines became trifling. There is a story[5] of a man going about in a crowd hitting right and left, and followed by a slave who paid up the damages on the spot. The Twelve Tables retain also the ancient rule that it is lawful to kill a thief caught at night in the act, or even caught by day, if he resisted apprehension. This also suggests the age of self-help, when every man took the law into his own hands. But on the whole, there is in

[1] See Muirhead, p. 102. [2] See Girard, 25.
[3] See Cuq. 340. [4] Gell. xx. 1, 38. [5] Aul. Gell. xx. 1, 13.

the Tables, the notion of crime as an offence against public order. This is not a primitive conception. At an earlier stage, men think only of delicts or wrongs done to an individual, and through him to his kinsmen. The family must take vengeance for such wrongs. Or, on the other hand, the offence may be an offence against the gods, which must be atoned for by sacrifice.

But in the Tables, penalties such as hanging, beheading, flogging to death, burning at the stake, or throwing from the Tarpeian Rock, show that by this time the Romans had learnt to distinguish crimes from sins, and both from delicts.

Section 5.—VALUE OF TABLES.

The great and permanent value of the Twelve Tables, was by no means the introduction of any great body of new law. Some new doctrines, no doubt, there were, but most of the law was declared, and not made by the Decemvirs. And the old and thoroughly settled rules, such as that a man's first heirs are his *sui*, are not stated. Much of the law remained common law, even after the codification. The great service the Tables rendered, was to make it clear that all citizens were equal before the law. There is no longer to be one law for the patrician and another for the plebeian.[1] They created a certainty of equal justice for all citizens, which till then had never existed at Rome. Moreover, the Tables dispelled for ever the complaint on the part of the *plebs*, that the law was an affair of mystery, the knowledge of which was kept from them by the pontiffs. This grievance was to some extent a fanciful one, for the general customary law of a country must be largely matter of common knowledge. The law has grown out of the usage. But at the same time the pontiffs were, as a fact, the exclusive possessors of certain knowledge, such as the days on which it was lawful

[1] See some examples in Cuq. 129.

to sue, and of the various steps of procedure without which the knowledge of the law itself was of no great service. But, even after the Twelve Tables had become law, the pontiffs for a long time retained a position of great influence. An ordinary citizen, as someone has said, no more knew how to make use of the Twelve Tables, than a modern peasant knows how to use a table of logarithms. The language of the Tables was very abstract and brief. A great many points were not dealt with, or only dealt with by implication. The Tables had to be interpreted, and the pontiffs supplied this legal construction or *interpretatio*. They had also to frame actions in accordance with the Tables. The forms of actions were most narrowly scrutinised, and if there was any want of precision a defender would plead that no relevant averment was made of any breach of law. These forms of actions were afterwards known as *Legis Actiones*, where the word *lex* means the Twelve Table—a use not uncommon.

Section 6.—INTERPRETATION OF TABLES A SOURCE OF LAW.

The Tables satisfied for a long time the demand for general legislation in the sphere of private law. For 350 years the chief advance was by the method of *interpretatio*, or construction of the Tables. Instead of repealing a provision of the Tables, or of setting up customary laws alongside of it, legal ingenuity busied itself in making the text of the Tables apply to new circumstances. During the 1000 years in which the Twelve Tables was nominally the Roman Code, Rome had advanced from a little town to be the mistress of the world. Commerce had grown up to a degree unparalleled in history. The law had to fit itself to these new exigencies. And in the early period this business of interpreting and thus slowly developing the law fell upon the pontiffs. It was they who gave legal advice, not only to the

magistrates to help them in the exercise of their jurisdiction, but also to private persons as to how they should make a contract or conduct an action. To take two examples. The Tables said "*si pater filium ter venumduit, filius a patre liber esto.*" "If the father sell his son three times, let the son go free." This was meant most likely as a check on harsh fathers who made a practice of selling their children to their creditors to stay as security until a loan was repaid.[1] But when a method was wanted to enable a *paterfamilias* to set free his son, this rule of the Tables was ingeniously twisted into another sense, The father might sell his son by a purely imaginary sale to a friend, thrice repeated into the bondage of another. The buyer every time manumits the son by *in jure cessio.*[2] The letter of the Tables has now been satisfied. The father has thrice sold his son. Accordingly he is free from the *patria potestas.*

This resort to forced constructions of the Twelve Tables is due in part to a strong unwillingness to repeal any part of the Tables themselves. Some changes were made, but it is easy to see how reluctant the Romans are to alter a word of the Twelve Tables, though they are quite willing to read it in a very unnatural sense. Perhaps this devotion to the letter is because the Tables were looked upon as of the nature of a constitutional compact between the patricians and the plebeians.[3]

[1] Muirhead, second edition, p. 114.

[2] Gaius, *Inst.* i. 132.

[3] Bruns, s. 19; Cuq. i. 140.

CHAPTER XI.

Plebeian Grievances.

Section 1.—*Conubium* and *Prætor Urbanus.*

There were two grievances of the plebeians which the Twelve Tables had not redressed :—

1. Their intermarriage with the patricians was still unlawful.
2. The plebeians were still ineligible for the magistracies.

And no time was lost in attacking these fortresses of the *ancien régime.* C. Canuleius, a tribune, moved in 445 B.C., only five years after the Tables—

First, That there should be *conubium* between the two orders ; and

Second, That the plebeians should be eligible for the consulship.

He carried the first reform, and his name is perpetuated in the *Lex Canuleia,* an important instance of a *plebiscitum* which received the *auctoritas* of the Senate. The admission to the consulship was staved off for a time. It was not until B.C. 367 that it was enacted by one of the *Leges Liciniæ* that in future one of the consuls should be a plebeian. The patricians attempted to deprive the concession of some of its value by taking away from the consuls their judicial functions, and by intrusting them to a new magistrate to be called the *prætor urbanus.* As he was to be a

patrician they hoped to retain in their own hands the administration of justice. Livy describes the chief duty of the prætor as *qui jus in urbe diceret.* He was of equal rank with the consuls, and, in their absence from the city, might, in some matters, act as their substitute. Like them he possessed the *imperium* or state authority. But, as the *imperium* of the consuls was military, and gave them the supreme command of the citizen army, so that of the prætor was civil, and gave him the supreme judicial power. The word prætor means, primarily, a general, and is a title of honour which was accorded to the consuls in the first centuries of the republic. He was really a third consul specially intrusted with the administration of justice, and in principle, his power was consular, though from the civil nature of his functions he took rank after the consuls. During his year of office the prætor, like the consuls before him, was invested with the judicial power which had belonged to the ancient kings. That is to say, in administering justice he was authorised to exercise his sovereign judicial discretion, being bound only by the letter of the *leges* or popular enactments which had then been passed, and by such ancient customs as tradition had invested with the force of law. The *leges* which affected the private law were few in number. I shall explain presently how the prætor came to exercise a great influence in moulding the law.

Section 4.—THE *PRÆTOR PEREGRINUS.*

As the city grew, and as foreign commerce became important, it was found necessary later on to appoint a second prætor whose duty was to administer justice in cases between foreigners at Rome litigating *inter se*, or cases between a Roman and a foreigner. This prætor was called, from his special duties, the *prætor peregrinus.* This office

dates from 242 B.C. After that the judicial work at Rome, so long as the Republic lasted was divided between the prætor *urbanus* and the prætor *peregrinus*. Later on other prætors were created with special duties. *E.g.*, six of them presided over different *quæstiones publicæ*. These were kinds of grand-juries, competent each to deal exclusively with particular crimes. Other magistracies were also created—the censors, with their charge of the census, the valuation roll, the preparation of the annual budget, and their *regimen morum*, the curule ediles, who looked after public health, sanitation, management of streets and public buildings, ordering of markets, &c., the quæstors, with their *custodia pecuniæ publicæ*—their duties as treasury officials—and their curiously different duties as public prosecutors in capital charges. All of these offices were at first confined to patricians. But with the exception of the quæstorship, they were all created at a period when the plebeians had already become conscious of their power, and were determined to vindicate for themselves the full enjoyment of political equality. In no long time they were all thrown open to plebeians. The last citadel to fall was, naturally, the pontificate. This also was thrown open by the Ogulnian Law of 300 B.C., although it was fifty years later—252 B.C. —before a plebeian was actually made *pontifex maximus*.

CHAPTER XII.

THE *COMITIA*.

Section 1.—THE COMITIAL SYSTEM.

DURING the Republic we are presented with the extremely curious phenomenon of the co-existence of three, if not four, distinct and co-ordinate legislative bodies.

In theory the legislative power lies with the people. They exercise their power not as with us in electing representatives. The people themselves vote directly upon the question proposed. But the method of voting is never the simple counting of the suffrages of individuals. It is always a vote of the people arranged into groups of some kind. The groups may consist of persons of the same stock as in the curies; of persons of a certain wealth, as in the centuries; of free-holders in a certain ward, as in the tribes. But it is always a majority of groups, whether curies, or centuries, or tribes, which carries the day. It is not a majority of the voters present. And it might therefore easily happen that a majority of actual voters were so distributed as to carry only a minority of groups. And the constitutional history of the Republic is, in fact, greatly taken up with this kind of "gerrymandering."

But what strikes us as so very odd is that various assemblies continued to exist at one and the same time in which the people were grouped according to different principles.

Section 2.—THE *CURIES.*

There is—(1) the old *Comitia Curiata.* This it is true is a mere shadow of its former self. The plebeians were at an early period divided among the *curies*, and could vote in that assembly.[1] How this was done is not clear. The plebeian had no *gens*. Possibly Karlowa's suggestion may be correct that all members of a particular tribe were admitted to a particular *curia.*[2] But after the *Comitia* of the Centuries got its full power, the *Comitia* of the *Curies* fades into insignificance, and is only kept in existence for certain ceremonial purposes. It continues to meet under the presidency of the pontiffs to pass the *lex curiata de imperio*, by which the higher magistrates, such as the consuls and prætors, were formally invested with the state-authority after their election by the centuries. And the *Curies* met twice a-year for what we might call private business. When so assembled it was called *Comitia Calata.* Its chief duties were first to inquire into all proposed arrogations,[3] these being transactions by which a *paterfamilias* puts an end to his *patria potestas*, and is adopted by another *paterfamilias*, and, second, to ratify the wills made by citizens.

Business was first laid before the pontiffs, and by them submitted to the *curies.* As the assembly became a mere form, the members ceased to attend. In the time of Cicero the pontiffs still used to summon the *curies*, but no one came except the thirty lictors or beadles, one for each *curia.* The *curies*, therefore, were not during the republic a genuine legislative body.

Section 3.—THE CENTURIES AND THE TRIBES.

But the centuries, the tribes, and the *concilium plebis* were all in a sense legislative bodies. It depended on chance or on the magistrate who proposed a measure

[1] Bruns, s. 21 ; Mommsen, *Abriss*, 28 ; Cuq. 122.
[2] I. 383.
[3] Gaius, *Inst.* ii. 101.

whether it was introduced in one assembly or another. If the magistrate was a consul he would introduce it into the centuries; a prætor preferred the *comitia tributa;* and a tribune generally summoned the *concilium plebis.* About 241 B.C. a change took place by which the centuries and the tribes were in some way amalgamated. The records are too meagre for us to know exactly what was done.[1] It appears that some uniform franchise was adopted, so that every voter in the centuries was also a voter in the tribes, and *vice versa.*

But the two assemblies continued to meet separately, the same electorate being convened for certain purposes to the centuriate assembly, and for other purposes to the tribal assembly. The centuries were convoked for the election of consuls, censors, &c., for making constitutional changes, and for state trials.

The tribes met to pass ordinary measures of domestic legislation.

Section 4.—THE *CONCILIUM PLEBIS.*

As time went on, the less formal body—the *concilium plebis*—became the most active legislative body. It was easier to convoke; discussions were allowed in the meeting itself; there was less technicality about its proceedings; and *de facto* it consisted of the same members as the *Comitia Tributa.* During the later Republic this is the active legislative body. The so-called *leges* of the last two hundred years of the Republic were really *plebiscita,* and even measures of finance and provincial government were introduced in the *concilium plebis.*

Extensive emancipation converted the *concilium* into a rabble of freedmen. Most of these were practically paupers, and ready for any intrigue or faction.

Hence under the early Empire the legislative power was transferred from the Comitia to the Senate, and *senatus-consulta* took the place of *leges.*

[1] Livy, i. 43; Karlowa, i. p. 385.

CHAPTER XIII.

The Senate.

Section 1.—Importance of Senate.

The popular meetings I have just described were quite unsuited for carrying on administration. They met, voted and dispersed. A permanent body to carry on the government of the country, or at least to keep a check on and supervision over the magistrates, was absolutely necessary. This want was supplied by the Senate. And we are not surprised to find that the Senate gradually drew to itself the chief power in the State. As the affairs of Rome changed from municipal politics to world-politics, the man in the street, the ordinary voter, became more and more unable to understand the issues involved. The conquest bit by bit of the civilised world; the conduct of long and anxious campaigns by land and sea; the management of an intricate foreign policy; the raising of an enormous revenue, and the supervision over its expenditure, were not things which could be decided upon in mass meetings, or left to the judgment of an ignorant electorate. More and more the Senate became the centre of government. Except the British Parliament, no deliberative assembly in the world has had to deal with such difficult questions of government, and especially government of foreign races, as the Roman Senate.

The composition of the Senate was completely changed during the Republic. The old Senate of the kings had con-

sisted of representatives of the patrician *gentes*, who may have been selected from the *gens* on the ground of their experience and reputation for wisdom, but very probably were chosen rather on the ground of birth as the hereditary chiefs of the clans. After the downfall of the kings, the consuls acquired the *lectio senatus*, or right to nominate senators. This was natural enough, as the Senate was in theory the council or advisory body which the consuls were bound to consult. At a pretty early date, probably from the beginning of the Republic,[1] the consuls began to choose from the plebeians as well as from the patricians. And very early, too, the practice grew up of choosing as a matter of course the ex-magistrates. After their year of office, the consuls, prætors, ædiles, and in later times the tribunes and quæstors, were virtually entitled to a seat in the Senate. In this way the Senate became a representative assembly. The people chose the magistrates, and the magistrates after their term of office became senators. They took their place in the Senate after their year of office, and could speak and vote, but were still not full senators until they had been chosen by the censors at the next revision.[2] By the *Lex Ovinia*, a plebiscite of about 312 B.C., the right of choosing senators was transferred from the consuls to the censors. The censors also were empowered to remove from the Senate any member whose conduct was unworthy. For this purpose they held a revision of the list of senators every five years. After that time a senator, though chosen for life, had an absolutely safe seat for five years only—*i.e.*, until the next revision. They then filled up the vacancies, taking first ex-magistrates. But they may reject an ex-magistrate on the ground of unworthiness (*præterire*). But the censors seem to have exercised this very important function with great discretion, and a senator whose conduct

[1] Karlowa, i. 357 ; but see Willems, *Le Droit Public Romain*, 188.
[2] Karlowa, i. 358 ; Mommsen, *Abriss des römischen Staatsrechts*, 309.

was good was not removed. The number of the Senate was 300 until the changes made by Sulla in the last century of the Republic. He raised it to 600.

Section 2.—The Choice of Senators.

The censors could, as a rule, only fill up vacancies as they occurred, and there were more ex-magistrates than vacancies. As they had a recognised right to sit in the Senate, the nominal number of 300 was somewhat exceeded. But this was only permitted so far as necessary, so that in practice the censors' choice of senators became inoperative. They must take the ex-magistrates, and the ex-magistrates more than filled up the vacancies. As the magistrates were more often plebeians than patricians—at least in the later Republic—the Senate lost its old patrician character. It became a chamber of ex-officials.

The Senate was the great Roman Parliament. Like our Parliaments it was the body which controlled the administration. To the Senate the Roman magistrates were responsible for the discharge of their duties. The Senate had supreme control over the public peace, and could take such measures as were necessary to preserve order, to suppress insurrection, and so on. It organised the government of the provinces, and when a new country was conquered decided what amount of self-government should be left to it.

It divided among the magistrates the provincial governorships and other important offices.

It had the general management of the public domain and of public buildings.

It discussed the budget and voted taxes.

It considered all negotiations with foreign peoples, and could virtually make peace or war, though there had to be a vote in the *Comitia* before the last step was taken. But

as a modern cabinet can so conduct negotiations as to leave to Parliament no escape from a war, so could the Roman Senate. The great point of distinction between the Senate and a modern Parliament was that during the Republic the Roman Senate was not a legislative body. Its resolutions were not strictly speaking laws.

Section 3.—*Senatus-Consulta.*

The Senate was convoked by a consul, prætor, or in later times occasionally by a tribune. The magistrate who convoked it presided. If it passed a formal resolution, this was called a *senatus-consultum.* It was really a direction to the magistrates, and couched in the form of advice. The Senate "*censuere*" so and so. The magistrate is to carry it out "*si ei videbitur.*" And the Senate by usage established the right to suspend laws on grounds of urgency. But, in practice, the influence of the Senate was so great that its resolutions were often treated as equivalent to laws.[1]

[1] See Krüger, *Röm. Rechtsquellen*, p. 24; Willems, *Droit Public Romain*, p. 211.

CHAPTER XIV.

Process of Legislation.

Section 1.—Illustrations of Laws of Republic.

The usual course of legislation was as follows:—

The bill must be initiated and drafted by a magistrate. Here is a great difference from our system. But it is more theoretical than practical. A private member can introduce a bill in our parliaments; but his chance of getting it carried is in most cases a slight one.

The Roman magistrate who has prepared his bill then brings it before the Senate. There it is discussed and voted upon. If the Senate is in favour of it, it is published, and a day fixed for proposing it to the *comitia*. Before that date it may be discussed in informal *contiones* or public meetings. At the *comitia* it is voted upon "Aye" or "No" without discussion. But, broadly speaking, the volume of legislation upon matters of private law is not great.

Most of the laws recorded during this period are in character constitutional, fiscal, sumptuary, or criminal. There are perhaps not more than twenty or thirty which make alterations in the private law, and few of these are of great importance. I may mention one or two of the chief leges of the republic.[1]

The *Lex Aquilia*—the great statute dealing with damages for injury to property.

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[1] See the list in Bruns, s. 25; Girard, p. 35; Muirhead, second edition, 237.

The *Lex Falcidia*, which entitled the instituted heir to a clear fourth of the succession, and cut down legacies so far as inconsistent with this.

The *Lex Voconia*, which for a time limited the freedom of bequeathing large fortunes to women.

The *Lex Cincia de donis*, to restrain lavish donations.

The *Lex Plœtoria*, which introduced remedies for the protection of minors against people who had taken advantage of their inexperience (*circumscriptio adolescentium*).

The *Lex Aebutia*, which revolutionised the ancient forms of civil process, and introduced the formulary system.

Section 2.—THEIR FEWNESS.

These may serve as examples. If we consider the long duration of the Republic, we cannot but be struck with the small amount of legislation upon private law. One great reason for this is that there were other ways of introducing necessary or desirable changes. The private law underwent, as a matter of fact, profound modification during the Republic. But the changes were made by custom, and by the prætor's edict, rather than by comitial legislation or by *senatus-consulta*.

CHAPTER XV.

Edicta Magistratuum.

Section 1.—The Checks on Magistrates.

The political insight of the Romans is nowhere seen to greater advantage than in the degree of power which they gave to the magistrates. They perceived that a jealous limitation of the authority of these great officials would hinder the progress of the community, and that individual freedom was not to be bought at the expense of strong government. Rather was it only by strong government that it could be secured. The danger which might arise from a too arbitrary use of the power of the magistrates they sought to guard against, not by narrow limitations of the authority committed to them, but by other checks. Such checks were:—

(1.) The limitation of the magistrates' power to a definite period—generally of one year—at the expiration of which he was responsible for his conduct to the Senate, and liable to a process resembling impeachment for abuse of his official position.[1]

(2.) The having two or more magistrates holding the same office with co-ordinate powers, each of whom has the right of *intercessio—i.e.*, of blocking any act of his colleague, *par majorve potestas plus valeto.*

(3.) A graduation of rank by which a higher magistrate could check any abuse of power by a lower.

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[1] Karlowa, i. 204; Mommsen, *Abriss des römischen Staatsrechts*, p. 135.

(4.) The *tribunicia potestas*, one of the chief functions of which was the *intercessio* upon acts of all magistrates, except those of a dictator.

Section 2.—THEORETICAL ABSOLUTISM.

This theoretical absolutism is very characteristic of Roman ideas. Thus the *paterfamilias* in early times had absolute power over those in his *patria potestas*. No doubt it was checked by the supervision of the *gens*, which, in an extreme case might exclude an offender from his gentile rights. And the fear of the censor's note was a restraint. But in theory the *pater* is absolute. So with the early kings. The Senate was merely a council of advisers which could counsel but could not restrain. And the idea was not lost when the Republic came in. Instead of one life-king we have two year-kings, subject to the two checks—(1) that one of them could veto the orders of the other, and (2) that they were liable to "impeachment" on leaving office.

In considering the great powers possessed by the Roman magistrates it must not be forgotten that the whole constitution was bound up with the state religion, and the sacred character which attached to the office of the magistrate generated a feeling of moral restraint. Every magistrate was to administer his office according to the will of the gods, and to ascertain this will he had the right of taking the auspices. The right to take the *maxima auspicia* belonged to consuls, prætors, censors, and dictators, and these were the *magistratus majores*. Minor magistrates were the ædiles, the *tribuni plebis*, the quæstors, and the *tribuni militum*.

Section 3.—RELIGIOUS CHARACTER OF OFFICE.

It was this auspicate character of office, this necessity for the holder of it to commune with the gods, which made the patricians regard the admission of the plebeians as impos-

sible. The *patres* for a long time had the idea that it was one of the prerogatives of their order to be able to discover the will of the gods. If magistrates were elected without this power—and the plebeians did not possess it—how was the state to be safely governed. This made them appoint censors to guard the sanctity of the Senate when, by the *Lex Canuleia*, the *plebs* at last got the *conubium*. This made them institute prætors and curule ædiles when the plebs were admitted to the consulship.

All the higher magistrates had *imperium et auspicium*. The *imperium* involved the *jus vocationis*—the right of issuing a summons to parties to appear before him—and the *jus decernendi*—the right of pronouncing a *decretum* or judicial sentence. The magistrate could compel obedience to his orders by taking security or by fine and imprisonment —*jus pignoris capionis, jus multæ dictionis*. Even some of the minor magistrates—*e.g.*, the tribunes, had the *jus prensionis* or *prendendi præsentem*—*i.e.*, the right of arresting a man who was before him, and of keeping him in detention. But the Roman's house, like the Englishman's, was his castle, and he could not be dragged thence. But a tribune had no *vocatio*. He enjoyed, however, an exemption from the *vocatio* of other magistrates.

The *imperium* also included the *jus edicendi*—the right to issue an edict or proclamation, and as we shall see, this right became in the hands of the prætors a most powerful engine for the development of the law. Like the *jus decernendi*, it was one of the attributes of the ancient kings which had descended to the magistrates who held, so to say, the royal authority in commission.

Section 4.—Widening of Power of Prætor.

The first edicts were probably of special, and not of general application. When the office of prætor was created

in 367 B.C., the new official was invested with the supreme judicial power which had formerly belonged to the kings, and afterwards to the consuls. When a person appeared before him alleging a wrong for which no remedy had been provided by the Twelve Tables, the prætor in those early days ordered the defendant to make a wager—*sponsio*—with the plaintiff that he would pay a certain sum if the plaintiff's averments were proved to be true. The *sponsio* grounding a *legis actio*, the matter was sent to a *judex* to ascertain the facts. Or, if two parties disputed the ownership of a thing, the prætor decided who should have the possession *ad interim*, on giving security, thus introducing the most important legal conception of possession, as distinct from ownership. But the excessive rigidity of the old procedure made it necessary by hook or by crook to get an action relevantly laid upon the express terms of the Twelve Tables. And the old forms of conveyance and of contract—the *mancipatio*, the *in jure cessio*, the *stipulatio*—were so formal that equitable considerations or questions of intention of parties were altogether excluded. The plaintiff either had a clear right because all the forms had been complied with, or he had no right at all because some formality had been neglected. The prætor's hands were tied, and his power of disposing of cases in an equitable manner was very restricted. His powers were, however, greatly widened by the *Lex Aebutia*. Its date is uncertain, but it seems to have been passed between 148 B.C.,[1] and 125 B.C. It abolished, with trifling reservation, the old system of procedure—the *legis actiones*—and substituted for it a new one, afterwards called the formulary procedure. Instead of presiding at the antiquated ceremonial of the vindication and the oath, the magistrate is to formulate in a simple way the issue which the juryman or *judex* is to try.

[1] See article by Girard in *Nouvelle Revue Historique de Droit Français*, 1897, pp. 249, 294.

Section 5.—THE *LEX AEBUTIA.*

Probably the *Lex Aebutia* did not give any cut and dry scheme. It provided, generally, that actions should be brought in the first instance before the prætor. If it appeared to him in his discretion that a relevant case was presented, he must set down the issue in writing—*formula—verba concepta*—and remit it to a *judex—i.e.*, to a private citizen taken from a panel, to be tried. The *formula* began with the appointment of a *judex*—if possible one agreed upon by the parties—*Titius judex esto.* It then went on, "If you (*judex*) are satisfied that such and such a right exists, or that such and such a fact is true (*intentio*) condemn the defendant (*condemnatio*), if not, acquit him"—*si paret, condemna, si non paret, absolve.*

The immense step marked by the *Lex Aebutia* was that it was no longer necessary to frame an issue out of the Twelve Tables. The prætor had not to draw up the pleadings or *formula* himself, but merely to decide that there was a relevant case presented, and that the pleadings were in proper shape, and that there was, as we should say, a joinder of issue, or, in the Roman phrase which the French law has retained, that there was *litis contestatio.* The plaintiff had to see that everything material to his case was stated, and the defendant had to see that every defence or exception upon which he relied was duly set down. Thus the formula generally contained, as pleadings do to-day, a number of statements drawn up by the plaintiff, and a number of other statements in defence drawn up by the defendant.

Section 6.—PERPETUAL EDICTS.

After the *Lex Aebutia*, the prætors began to find the importance of following some general rules, and the advantages which would ensue to the community if these rules were generally known. Accordingly they took to publish-

ing edicts of a different nature from the special and private ones to which I have referred. These edicts, limited to special cases, came to be called *edicta repentina.* The new kind were called *edicta perpetua* or *perpetuæ jurisdictionis causa proposita.* This was a publication by the prætor at the commencement of his year, that if certain facts were averred he would grant a case for a *judex* to try. *E.g.*, the old law regarded an obligation as binding, although one of the parties had been coerced into it. If a man had undertaken to pay money, he was bound, although in fact he had never willingly consented, but had yielded to the fear of violence. This was obviously unjust, and the prætor declared that he would not treat an obligation as binding if it was shown to have been extorted by violence or threats of violence. *Quod metus causa gestum erit ratum non habebo.* Again it was a too common experience of travellers to find that their horses or goods had disappeared mysteriously without its being possible to fix anyone with liability. The prætor declared that he would hold the innkeeper or the carrier liable, unless he could show that the things had been destroyed by *force majeure*—the act of God or the king's enemies, as English lawyers say. Innkeepers and carriers were by this rule to guarantee the honesty of their servants, *nautæ caupones stabularii quod cuiusque salvum fore receperint, nisi restituent in eos judicium dabo.* Our rules as to the liability of common carriers and hotel keepers are derived from this edict.

Section 7.—The Traditionary Edict.

By making declarations of this kind the incoming prætor indicated the principles by which he intended to be guided during his tenure of office. At first these proclamations were not binding, even upon the prætor who issued them. One of the charges against Verres was that he had shown gross partiality by not adhering to the rules which he had

declared in his edict. And, without such gross breach of trust, it was common enough for a prætor who thought he could improve on his original edict to vary it by *edicta repentina*, or subsidiary edicts issued during the year. As this led to a want of certainty in the administration of justice, it was enacted by the *Lex Cornelia*, B.C. 67, that the prætors should abide by their first edict, *ut prætores ex edictis suis perpetuis jus dicerent.* But the new prætor who succeeded was, in theory, entirely free to disregard the edict of his predecessor, and to publish a new one, containing perhaps, rules directly opposed to those which had been in operation the year before. In practice little mischief seems to have resulted from this freedom. The common course seems to have been for the new prætor to get some jurists in whom he had confidence to go over the edict of the retiring prætor, making minor alterations which experience had shown to be desirable, embodying the *edicta repentina* of his predecessor, if these contained any valuable principle, and sometimes inserting a few new rules which commended themselves to the new prætor and his advisers. In time, the profession and the public felt the importance of adhering to settled rules, and the convenience of making gradual emendations. Novelties were seldom introduced unless they had been called for by this public opinion. The edicts were published upon boards or tables of wood painted white, and set up for that purpose in the Forum. Hence the edicts are sometimes called the *album.* As time went on, the edict became more and more stereotyped. Rules which had worked well, and had approved themselves to the public were not altered, and were handed down from one prætor to another. This part of the edict which the new prætor no longer ventured to change got the name of the *edictum tralaticium*, or the traditionary edict. The new prætor confined himself to making a few additions—*nova edicta, novæ clausulæ.* By the time of Cicero the greater part of

the edict had already become tralaticious, so that he describes the prætorian law as a sort of customary law: *Consuetudinis autem jus esse putatur id, quod voluntate omnium sine lege vetustas comprobarit, quo in genere et alia sunt multa et eorum multo maxima pars quæ prætores edicere consuerunt.*[1]

In this way a regular system of law grew up in the Prætorian Court which formed a very important addition to the statutory and customary law already in force. One might say the edict was a kind of Code of Civil Procedure, including a good deal of substantive law which the prætors slowly built up bit by bit. But in spite of the differences of form, the edict corresponds most closely to our judge-made law. The prætor's attention was called to some defect or anomaly in the law applicable to some case which came before him. He laid down a rule which seemed to him to do justice in the particular case, and then declared that if similar facts again presented themselves he would give the same decision. The rule was then, in all probability inserted in the next year's edict. The edict did not state general principles, but declared what the prætor would do in certain circumstances: "I will hold an agreement in such and such terms valid;" "In such a case I will grant an action;" "If a minor has been taken advantage of I will give him '*restitutio in integrum*';" "In such a case the party must make exhibition." As, originally, the edict was merely intended for one year, and expressed the promise only of the incoming prætor, the party desiring to avail himself of the remedy must raise his action during the year in which that particular prætor was in office. From this originated the rule that a prætorian action—that is an action not based on the old *jus civile*, but on the prætor's edict, must always be

[1] *De Inv.* ii. 22, 67.

brought within a year after the cause of action had arisen. About 242 B.C. the increase of commerce made it necessary to appoint a second prætor. To him were assigned all cases arising between two peregrins—*i.e.*, foreigners living at Rome, or between a Roman and a peregrin. He was called from this the *prætor peregrinus*. It was impossible for him to apply the strict *jus civile*, for a peregrin could not be a party to the conveyances *mancipatio* and *in jure cessio* which the *jus civile* required. The prætor was, therefore, obliged to seek out principles of equity applicable to traders of different countries in dealing with each other. The equitable rules which he introduced were what the Romans called the *jus gentium*, which I shall describe more fully at a later stage.

Section 8.—URBAN PRÆTOR BORROWS FROM FOREIGN PRÆTOR.

Gradually the *prætor urbanus*, perceiving the simplicity and justice of these new rules which were thus introduced for the benefit of foreigners, began to think he might apply them to citizens. He took to borrowing a good deal from the edict of his colleague. In this way the *jus civile* became saturated with new and simpler forms and doctrines. The prætor had no power to legislate, but he could grant or refuse an action as seemed to him good. When the prætor's hands were freed from the chains of the old procedure by the passing of the *Lex Aebutia*, the edict rapidly became the chief engine of legal development. It became what Cicero calls it—the *viva vox juris civilis*. As the edict was never valid for more than a year, it was a convenient instrument for giving new principles a trial. If the innovations did not answer they could be dropped at the end of the year. But, as I have explained, the prætors became more and more unwilling to strike out any rule which had once found its way into the edict. If they

wished to state what they would regard as an exception to the general rule already enunciated in the edict, they stated it as a concrete case.

Section 9.—And from Provincial Governors.

In addition to the edicts of the two prætors at Rome, the provincial governors each issued an edict for his province. They borrowed largely from the prætorian edicts, but made such alterations and additions as might make their edict suitable to the particular province. In this way where a province had customs and laws of its own, they might be retained if desirable by being put into the *edictum provinciale*. The provincial edicts also made regulations for the protection of quasi-property in land and quasi-real rights. For all land in the provinces belonged in theory to the state. The occupants had only precarious enjoyment as long as they were left in possession by the state. But though this was their legal position, they had, practically, the right of ownership, for they were not disturbed, and they alienated their lands or left them by will just as if they had been absolute owners. These provincial edicts were, in their turn, studied by the *prætor peregrinus* at Rome, and helped him to see what rules were observed in different countries. They served him as collections of statistics.

Section 10.—Edicts of Ædiles.

The ædiles also issued edicts relating to the matters falling within their competence, such as police-regulations and the rules of open markets for the sale of slaves or cattle. One or two of their regulations affected the general law—*e.g.*, it was the ædiles who first laid down the rules which the French law among others still retains: (1) that the seller is bound for latent defects, even when they were not known to him, unless he stipulates that he sells without warranty; and (2)

that the buyer in case he discovers the thing sold has such a latent defect or vice is to have an option. He may return the thing and get back the money, or, if he prefers it, he may keep the thing and sue for a return of a fair proportion of the price. This is the *actio quanti minoris.* But as to defects which the buyer might see for himself there is no warranty. *Caveat emptor.* "His eye is his merchant." But except for a few provisions of which these are the most important, the ædiles introduced no changes into the general law.

Section 11.—Prætor's Edict, Main Mode of Changing the Law.

The prætor's edict had already become in the time of Cicero the great organ of legal development. He complains that the Twelve Tables are no longer studied, and that philosophical speculation is neglected from the prevailing view that the best fountain of jurisprudence is the prætor's edict. *Non ergo, a prætoris edicto, ut plerique nunc, neque a XII. tabulis ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas* (*de Leg.* i. 5, 17). The law made by the prætors was called *jus prætorium* or *jus honorarium.* We might translate the latter term by "magistrates' law"—law made by those who hold the *honores.* It would include the rules brought in by the ædiles. Most of the *jus prætorium* consisted of the commercial law—the *jus gentium.* But the prætors changed the law even in matters which concerned citizens only—*e.g.,* to the *jus prætorium* belong the changes in the law of succession and the grants made by them of *bonorum possessio* to emancipated children or others who were not heirs by the *jus civile.* So also the *actio exercitoria* or the *actio institoria,* by which the shipowner or the shopkeeper, as the case may be, is sued for debts contracted by the captain of the ship or the manager of the shop, was part

of the *jus prætorium*, though at first these actions seem to have only been competent against citizens,[1] Papinian in a famous passage[2] says *jus prætorium est quod prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratia propter utilitatem publicam.* Before the *Lex Aebutia* the prætor's work was mainly *adjuvare vel supplere.* But afterwards he began boldly *corrigere.* At first his method was to apply the rule of law to cases not within the contemplation of its framer. He said, in effect, "this case is analogous to the case dealt with by the law. In extending the rule to it I shall be within the spirit if not within the letter." But just as the English Courts of equity came by a very similar process to create a body of rules over-riding upon many points the rules of common law, so it was with the Roman prætor. After the *Lex Aebutia* the *judex* who heard the case was far more dependent than formerly upon the magistrate's instructions. He might in certain circumstances be directed to find for the defendant, though by the *jus civile* he would have been liable, or he might be told to find for the plaintiff in circumstances where the civil law gave no remedy. Just as in England there might be a case in equity but none at common law, so in Rome there might be a case because the prætor thought it fair.

Moreover, when the prætor felt obliged to grant an action with which he did not sympathise, he might, if he chose, grant it only upon the plaintiff's finding security for costs. This might stop the suit, or deter others from raising similar ones.

Section 12.—*In Integrum Restitutio.*

Thus, to give one or two examples of prætorian remedies:—Suppose a minor has been cheated, or, at any rate, that advantage has been taken of his youth to lead him into an

[1] See Karlowa, i. 469.

[2] D. i. 1, 7, 1.

unprofitable transaction. The prætor said, "I will make the other party put things back in their former position. I will grant an *in integrum restitutio.*" Or, suppose a *res mancipi*, which can only be conveyed by *mancipatio* or *in jure cessio*, has been bought and delivered to the buyer without either of the solemnities. By the *jus civile* the seller is still the owner. He can bring a *vindicatio* to get the thing back, even though he has the price of it in his pocket. But the prætor gave the buyer the *exceptio rei venditæ et traditæ.* Or, suppose the buyer in such a case has lost the possession of the thing which he had acquired *bonâ fide* but without the proper form of conveyance. The thing has got into the hands of another. The buyer cannot bring a *rei vindicatio.* for his title as owner is defective. He has not the *dominium ex jure Quiritium.* But some prætor called Publicius invented an action called after him the *actio Publiciana*, by which the buyer, though, strictly speaking, he was not the owner, was given the right to sue upon the legal fiction that he had become owner by *usucapion.* The case sent to the *judex* is, "If you, the judge, find that the plaintiff would have been owner of the thing *if he had held it for the period of usucapion*, then give judgment in his favour."

Section 13.—The Publician Action.

The buyer who has this right of action is called the bonitarian owner, as opposed to the quiritarian owner who has the strict legal title. He has an equitable title which the prætor protects, just as in England the Chancellors protected equitable rights which were not protected by the common law. And even if the quiritarian owner has recovered possession of the thing, the prætor will let the bonitarian owner bring the Publician action. The defendant may plead the *exceptio justi dominii*—that is, that he has the legal title. But to this the plaintiff may rejoin by the

replicatio doli or *rei venditæ et traditæ.*[1] Or, let us suppose, a thing has been acquired on a good title and in good faith from a man whom the buyer believed to be the owner, though in fact he was not—*a non domino.* If the possessor loses the possession he may recover the thing from a third party by the *actio Publiciana,* on the fiction that he has completed *usucapion.* As a *bonæ fidei possessor* the prætor treats him as owner in a question with anybody but the true *dominus.* The first case, in which the thing was acquired from the Quiritarian owner but by an informal conveyance, is called *in bonis possessio.* The second case where it was acquired *a non domino,* though perhaps by a valid form of conveyance, was *bonæ fidei possessio.*

There are, therefore, two cases in which the *Actio Publiciana* is available :—(1) When a *res mancipi* has been acquired without *mancipatio* or *in jure cessio ;* and (2) when anything has been acquired *a non domino.* It is easy to see what a deadly blow was in the first case dealt by the prætor at the formal conveyances of the old law. In the second application of the Publician action we see a great step taken towards the doctrine that a purchaser in good faith deserves every protection, and that to make his position insecure is to shackle the advance of commerce.

Section 14.—*Negotiorum Gestio.*

Again, take the doctrine called *negotiorum gestio.* If it appear that A. during B.'s absence has interfered to do something for B.'s advantage, then A. can claim compensation for his outlay from B., and, on the other hand, if A. has done harm, B. has an action against him. *E.g.,* A. is absent in the wars. His house shows signs of falling down. B., his neighbour, has it repaired. B. can recover his expenses, provided they were spent to A.'s advantage *at the time.* If

[1] See Girard, *Manuel,* p. 343.

A. had abandoned the house, and it was of no value to him, B. could not recover, though he had spent money upon it in good faith. But if it was a valuable house, and his repairs saved it, he can recover though later on, before A. came back, the house should chance to be burnt down.[1] *Negotiorum gestio* was quite a new doctrine. The early lawyers saw great difficulty in admitting that there could be a legal claim for repayment where there had been no contract between the parties, and no delict on the part of the defendant. The prætor brought in the idea of a quasi-contract or liability arising from a relationship which was like a contractual relationship. Even now the principle is not recognised by the law of England, though it is by that of Scotland. The French law follows the Roman.[2]

Section 15.—Slaves Irregularly Set Free.

Take again, as an illustration of the prætorian law, the case of a slave irregularly manumitted. By law there are three ways only in which the master can free his slave: *censu, vindicta, testamento.* But a master might have neglected to comply with any one of these three forms, and might still have signified in an unmistakable manner that he desired to give liberty to his slave. In such a case the prætor will not allow the master or his heir to compel the ex-slave to return. *De jure* he is still a slave, but *de facto* he is protected in the enjoyment of his freedom. He is not a freeman, and what he earns is still his master's. His children also are slaves. But still he is protected to some extent. Later on the position of such slaves was dealt with by statute. The *Lex Junia* said they might earn money for themselves, but when they died their property reverted to the master. They lived as freemen, but died as slaves.

[1] D. iii. 5, 10, 1.

[2] Code Civil, arts. 1372 *seq.* ; see Civil Code of Lower Canada, 1046.

Section 16.—*Bonorum Possessio.*

Or, take the most important of all the prætorian doctrines —viz., *bonorum possessio*, by which, in course of time, the whole law of succession was altered. The prætor could not make an heir. He was not a law-maker. But he could give a man the possession of the succession of a deceased person, and protect him in it as if he had been an heir. Suppose—*e.g.*, a father had emancipated his son. By law the son was now a stranger to his father. The father dies intestate. The emancipated son has no claim on his succession. But the prætor gives him *bonorum possessio* to an equal share with his unemancipated brothers and sisters. This is only one of many cases in which the prætor enlarged or altered the class of persons entitled to share in a succession.

The edict was, as these illustrations have indicated, the main instrument by means of which the free principles of equity—*jus æquum*—gained their victory over the older *jus civile.* The prætorian edict reached its climax in the last century of the Republic. It was then fully recognised that the *jus honorarium*, most of which was now permanently settled or tralaticious, was entitled to rank side by side with the *jus civile.*

The history of "equity" in the English law, and the power of the Chancellor to grant relief when the common law was too rigorous, presents an interesting parallel.[1]

[1] See *supra*, p. 30.

CHAPTER XVI.

The Jurists.

Section 1.—The Pontiffs.

In early Rome, as in the early history of most peoples, the first lawyers were the priests. Law and religion were inextricably intertwined. The members of the Roman College, or Corporation of Pontiffs, were long regarded as the sole guardians of the mysteries of the law. Every step taken without the advice of a pontiff was fraught with danger, and might draw down the wrath of the gods. They distinguished, it is true, between *Fas*, with which they were concerned primarily as priests, and *Jus*, with which they had to do as lawyers. But they were the only authorised interpreters of both the *Fas* and the *Jus*. It was their business to inform the inquirer as to *Fas* how he should perform rightly the services of religion, and the inquirer as to *Jus* what were the necessary solemnities which he must observe. Every legal step at this stage of development required the use of stereotyped forms — *certa et solemnia verba*. Moreover, the pontiffs alone knew what days must be kept sacred and not profaned by any legal business. This knowledge of juridical and non-juridical days—*dies fasti et nefasti*—was most jealously guarded, and was one of the chief sources of the influence of the pontiffs. If a magistrate unwittingly exercised his jurisdiction upon a holy day—a *dies nefastus* —*per quos dies nefas fari prætorem do, dico, addico*[1]—

[1] See Schulin, *Lehrbuch der Geschichte*, p. 510.

he had to perform a sacrifice in expiation. If he acted wittingly, Q. Scaevola doubted if any expiation would wipe out so terrible a sin. They also knew the forms of action and the rules of interpretation which had become settled.

The oldest mode of settling a dispute was for the parties to apply to the pontiffs to tell them in what form the question could lawfully be raised for decision. They then went before the king who heard the case. If he was in any doubt about the law he got an opinion from the pontiffs.

Section 2.—PUBLICATION OF PONTIFICAL LAW.

The secrecy with which the pontiffs guarded their knowledge of the forms of actions and of the lawful and unlawful days was very unpopular. A decisive blow was dealt at this system of mystery by a publication issued in 304 B.C. by Cn. Flavius, the son of a freedman, and secretary to Appius Claudius, the censor. It was done, very likely, at the instigation of Claudius himself. Claudius was a patrician by birth, but a bitter opponent of his own order. How he procured his information about the secrets of the pontifical college is unknown. Probably by taking notes of the decisions pronounced and by making careful inquiry among those who had consulted the pontiffs, Claudius may have gradually collected enough information.[1] Flavius' book was called the *Jus Flavianum*. It was supplemented by a further collection of forms issued by Sextus Aelius, surnamed "Catus" or "cunning." This is called the *Jus Aelianum*. This secularisation of the law, by which it was taken away from the priests, marks undoubtedly an important point in the history of the law. And another important step was taken only half-a-century after the *Jus Flavianum*. This was the commencement of public instruction in law. Tiberius Coruncanius, the first plebeian *Pontifex Maximus*, was the

[1] Cuq, *Les Institutions Juridiques*, p. 447.

first *publice profiteri*[1]—*i.e.*, probably the first to admit students to his house who were allowed to be present at his consultations with people who came to him for advice. After him there began a line of jurists, and a system like the English "Reading in Chambers" became common. A young Roman of the upper class who intended to become a lawyer, or to adopt a political career, used to attach himself to some jurist of reputation. Thus Cicero says that as soon as he had assumed the *toga virilis* he was taken by his father to Q. Mucius Scaevola (the Augur—not the author of the Commentary), and as long as he could he never left the old man's side. The students were called *auditores*. It was considered so honourable for a jurist to have these pupils that even the most eminent men never refused to take them. The pupils were present at the jurist's consultations with his clients, and discussed with him, in private, the questions which arose. The master also gave them theoretical instruction, explaining the Twelve Tables and the other authorities, and supervising their reading of legal MSS. Even when the *auditores* had acquired a knowledge of law they frequently continued to read with the master and to help him, very much as young barristers in London "devil" with a practising counsel. At this stage they were called *studiosi*.

Section 3.—The Work of the Lawyers.

The extraordinary growth of Rome and the constant influx of foreigners led to a great demand for legal advice, and the houses of the famous lawyers, such as Scaevola, were thronged from morning to night with clients. It is said that the Senate presented Scipio Nasica with a house on the Via Sacra that he might be able to see his clients with greater convenience. They were often consulted about matters not strictly legal, such as the proposed marriage of a daughter

[1] D. i. 2, 2, 38.

and so on, and Cicero says, roundly, that the jurists gave advice about all things human and divine. Their clients came at all hours, and Horace[1] says, "the lawyer, when the client knocks at his door at cock-crow, envies the lot of the farmer." The profession of a jurist differed in one somewhat important particular from that of a modern lawyer. It was purely gratuitous. Neither from their clients nor from their pupils did they accept any payment. The jurists of the Republic belonged almost exclusively to great and wealthy families. The chief personal advantage they derived from their services as jurists was that it brought them into notice and helped them if they became candidates for office. A great number of the Republican consuls were taken from this class. Cicero divides into four branches the professional work of these early lawyers—the "*veteres*" as they were called in later times—*Respondere, Cavere, Agere, Scribere.*[2]

Respondere means the giving of an opinion as to the law of a case, either when consulted by a judge or by a private client.

Cavere was the fixing of the proper form in which to raise an action.

Agere was the conducting of the case in Court.

Scribere was the drawing of deeds or legal documents.

Some of the *veteres* also wrote books. The first scientific Roman law book was by Q. Mucius Scaevola, the younger, called the *Pontifex Maximus*, to distinguish him from his namesake, the Augur. He wrote, about 100 B.C., a treatise on the *Jus Civile* in eighteen books. Scaevola was the first to explain clearly the nature of many of the most important legal institutions—*e.g.*, wills, legacies, partnerships, &c.

Section 4.—THE *RESPONSA* OF THE LAWYERS.

The consulting of a jurist by the judge in a case is a very peculiar feature of the Roman system. It would seem

[1] Sat. i. 1, 9.

[2] De Orat, i. 48.

strange with us if a judge before deciding a point of law should take the opinion of counsel upon it. But it is natural enough when we remember that the Roman *judex* was not a lawyer, but a layman. All through the Republic and down to the time of Diocletian, who began to reign in 284 A.D., cases were remitted for trial to a *judex*. Upon any point of law he required to be directed, and one of the chief duties of the jurists was to give opinions, *responsa*, for the guidance of the *judex*, his *responsum* taking much the same place as a judge's direction to a jury in our system.

The *judex* was, in fact, more like a single juryman than a judge—*e.g.*, if the *judex* wanted to know if the facts proved amounted to fraud (*dolus malus*), or if the *bona fides* of one of the parties ought to relieve him from penalty, or what amounted to accident (*casus*) and so forth, it was to the opinions of the jurists that he looked for instruction. In early times the jurist went to the Court and gave his opinion like an expert witness. Later on, he sent his *responsum* in writing to the judge. Still later, towards the close of the Republic, it was usual for the jurist to give his opinion to the party consulting him. He gave it in a sealed document which was opened and read in the Court.[1] Under the Empire, as we shall see later, it became necessary to formulate precise rules with regard to the weight which was to be attached to the opinions of certain jurists.[2]

[1] A particularly interesting and full description of the activity of the jurists is to be found in the unfinished work of Paul Jörs' *Römische Rechtswissenschaft zur zeit der Republik* (Berlin, 1888).

[2] *Infra*, p. 149.

CHAPTER XVII.

IE THIRD PERIOD—THE PRINCIPATE OR DYARCHY.

Section 1.—THE *PRINCEPS.*

: period from 27 B.C., when Augustus voluntarily gned his extraordinary powers and affected to restore the ublic, down to 284 A.D., when Diocletian ascended the ne, is often called either the principate or the Dyarchy. theory the powers of the state during this period are ded between the emperor and the senate. The emperor he *princeps*, the first citizen of the Republic, and the out- d forms of republicanism are preserved. It is true that disguise becomes thinner and thinner as the time goes

The power of the emperor is always increasing at the ense of that of the senate. But until Diocletian, the peror is not an avowed despot. In addition to the peror there are as, to some extent, independent authorities he senate, the magistrates, and the *Comitia*. The last, it rue, has become a mere *simulacrum*, and the others are indling away.

Section 2.—THE *COMITIA.*

Their judicial power as the supreme Court of Appeal in ital offences was taken from them under Augustus, and n to the *quæstiones* or large juries, each competent to l with certain crimes only. Their power to elect the istrates was taken away in the year 14 A.D. and given to senate. Their legislative power continued to be exercised

during the reign of Augustus and the first half of the reign of Tiberius—*i.e.*, to about 25 A.D. After that it disappears. The only *lex* in the sense of comitial enactment which occurs after that is the formal *lex regia de imperio*—the act conferring the *imperium* upon a new emperor.

Section 3.—The Senate.

The senate had succeeded to the right of electing the consuls, prætors, &c. Certain of the provinces were placed specially under the administration of the senate, and were called the senatorial provinces, in opposition to others which were called imperial, as being directly under the control of the emperor. The revenues of these two groups of provinces were kept distinct. The senate had the management of the *ærarium* or public treasury, into which flowed the revenue of the senatorial provinces, while the emperor administered the *fiscus principis* which was sustained by the imperial provinces.

Moreover, early in the Empire the senate began to exercise genuine legislative powers. But the influence of the senate was, throughout this period, and especially in the latter part of it, more apparent than real. The prince became more and more powerful, and the senate more and more servile.

Section 4.—The Magistrates.

The emperor himself was the chief magistrate. In theory his powers were conferred upon him by the people. He had the consular *imperium*, and in virtue of it he was the commander-in-chief of the army. He had the *tribunicia potestas*, and in virtue of it his person was inviolable, and he could block the acts of any magistrate. The old republican magistrates, consuls, prætors, tribunes, &c., continue to be *elected* annually. And the consuls and prætors, when their

year of office is expired, are sent as governors to the senatorial provinces. But the emperor takes care to leave no army in these provinces, and gradually assumes a greater degree of control over all the magistrates. He creates a new set of officials, appointed solely by himself and accountable only to him—*e.g.*, the *præfectus urbi*, the chief of police; the *præfectus prætorio*, the captain of the Prætorian Guard. In time the authority of these great officers of the imperial household completely overshadows that of the elected magistrates.

Section 5.—The Sources of the Law during the Principate.

There are six sources of the law during this period, each of which will need to be mentioned. They are custom, *leges*, *edicta*, *senatus-consulta*, *constitutiones principum*, and *responsa prudentium*. The seventh source of the old law—viz., *plebiscita*, has now disappeared, and the *leges*, *edicta* and *senatus-consulta* are really only various forms in which it suited the emperors for a time to express their own will.

1. Custom (*usus*, *mos*, *consuetudo*). This continues to be a source of law and also to abrogate laws.

2. *Leges*. We do not hear of any comitial legislation, except the formal *lex regia*, of later date than about 25 A.D. —*i.e.*, the middle of the reign of Tiberius.

Augustus was fond of getting his wishes carried out by laws of the *Comitia*, and himself proposed some important measures which he brought before the *Comitia* in his character as tribune.

Among the *leges* of the early empire there are some very famous enactments which it may be well to mention. Several of them are attempts to grapple with the great social problems of the time. It was a period of unusual corruption of manners. Marriage was avoided, and popula-

tion would have decreased but for the foreign immigration. The blanks made by civil war were not filled by a new brood. The greatest possible laxity existed as to the marriage tie, and divorces upon the most frivolous grounds were extremely common. The corrupt state of society was attributed partly to the great number of freedmen. Many of these enfranchised slaves were Asiatics or Greeks. They were frequently persons of dissolute character, who, not content with the indigenous vices of the capital, introduced the depraved Romans of the wealthy class to every form of Oriental immorality.

Section 6.—Social Legislation.

Augustus tried by legislation to stem this tide of license. The *Lex Julia et Papia Poppœa* and the *Lex Julia de maritandis ordinibus* were laws passed to encourage marriage, and at the same time to check alliances between persons of very unequal condition, such as between senators and freedwomen or actresses. The *Lex Papia Poppœa* (A.D. 9) is often called the *lex caducaria*, because it tried to encourage marriage by a system of *caduca* or forfeitures. Men between 25 and 60 and women between 20 and 50, if *cœlibes*—*i.e.*, not married, were not allowed to take benefits under the will of any stranger unless they had some excuse satisfactory to the law as well as to themselves for not marrying. If *orbi*—*i.e.*, married but childless, they could only take one-half of what was left to them. The shares so forfeited were called *caduca*. They went to the other heirs or legatees not disqualified, and, failing any such, to the *fiscus*. Caracalla made *caduca* lapse directly to the *fiscus*.

E.g., a testator appoints A, B and C as his heirs :—

A is married and has children.

B is married and has no children.

C is unmarried and over 25 years old.

C takes nothing under the will unless he betroths himself within 100 days after the opening of the succession, and marries within two years.

B only takes half his share.

A takes all C's and half B's share in addition to his own, until Caracalla sweeps the *caduca* into the net of the fisc.

But these rules did not apply when the testator was related to the heir or legatee within the sixth degree. Husband and wife who had no children could take only one-tenth of what was left them by the other consort, and in addition one-tenth for every deceased child. This part of the *Lex Julia et Papia* was called the *lex decimaria.*[1] Other advantages in the way of public honours, eligibility for office and so on are offered to fathers of several children, and patrimonial penalties are imposed on divorce.

The *Lex Julia et Papia* was a well-meant measure, but it did as much harm as good. Innumerable devices were resorted to by ingenious schemers of the wealthy class to foist off the children of others as their own, and to prevent the marriage of persons whose shares if caducous might fall to the schemers.

The sons of Constantine abolished the penalties[2] of celibacy and childlessness, and the *lex decimaria* was repealed by Honorius and Theodosius.[3] Other provisions fell into desuetude, and in the time of Justinian all this legislation was a dead letter.

Section 7.—The Freedmen.

There were also important comitial laws passed in the early empire which attempted to deal with the dangers caused by the growing number of freedmen. These were the

[1] Girard, 853. [2] C. viii. 58, 1. [3] C. viii. 58, 2.

Lex Aelia Sentia, the *Lex Junia Norbana* and the *Lex Fufia Caninia*.

The *Lex Aelia Sentia* (A.D. 4) placed restriction on manumissions :—

(1.) A master under twenty was not to be allowed to manumit a slave unless he did so *vindicta* and for a reason approved of by a special *consilium* appointed under the *Lex* to inquire into manumissions.

(2.) A slave under thirty could not be manumitted except subject to the same restrictions.

(3.) Manumissions in fraud of creditors were to be invalid.

(4.) Slaves who had been guilty of serious crimes or had been kept as gladiators were in no case to become citizens when manumitted. They were to have the status of enemies surrendered at discretion—*deditícii*—and were prohibited from living within 100 miles of Rome.

The *Lex Junia Norbana* cleared up doubts as to the exact status of slaves who had been irregularly manumitted—*i.e.*, not *vindicta aut censu, aut testamento*. Their position was to be something like that of the *Latini Coloniarii*, and hence they were called Junian Latins. Like the Latin allies they had *commercium* but not *conubium*. But unlike them they could not make a will. At death all their property reverted to their old master or to his heirs. The Junian Latin, it is said, lived as a freeman, but died as a slave.

The *Lex Fufia Caninia* forbade any owner to manumit by will more than 100 slaves, and in any case only allowed him to manumit a certain proportion of his slaves. These laws were, to a great extent, obsolete before the time of Justinian, and so far as still in force they were entirely repealed by him.

But after this social legislation of the early empire the legislative activity of the *comitia* entirely ceases. And even *in passing* these *leges* the *comitia* did not exercise any

independent judgment, and would not have dared to reject a measure desired by the *Princeps*.

Section 8.—The Edicts of Magistrates.

With the establishment of the Empire it was natural that a change should come over the prætor's power of issuing edicts which should alter the law. This power was, as I have said, part of the sovereign authority which at the expulsion of the kings had devolved upon the republican magistrates. It seemed to the emperors to be inconsistent with their own power to allow a magistrate to retain this right of making laws without the imperial sanction. And the *tribunicia potestas* of the emperor enabled him if necessary to veto any proposal of the prætor. The prætor's power of making law was not at first taken away. But he hardly dared to exercise it except at the suggestion of the Senate or the emperor. *E.g.*, when the Senate passed the *Senatusconsultum Velleianum*, providing that obligations of suretyship entered into by women, married or single, should be void, they directed the prætors to make rules to carry out this new principle. Hadrian thought the time had come to close the chapter of prætorian legislation. He conceived the plan of casting the edict in a permanent shape, and of depriving the prætors of the power to make further changes. By this time the *prætor urbanus* had borrowed so much from the *prætor peregrinus* that the two city edicts were alike in all essentials, and the edicts of the provincial governors had been assimilated to these. Hadrian, about 128 A.D., directed the famous lawyer Salvius Julianus to revise the edicts of the two prætors, and to add to them the market regulations and so forth contained in the edict of the ædiles. When the revision was complete it was ratified by the Senate, and declared to be henceforth unalterable by the prætor. If changes are made they must be made by the

emperor. This consolidated edict is called the *Edictum Hadrianum* or *Julianum*, or sometimes the *Edictum Perpetuum*, using that word in a new sense.

It is probable that the edicts of the provincial governors were also consolidated and published as the *Edictum Provinciale*. In theory the distinction between *jus honorarium* and *jus civile* was not destroyed. The prætors and the governors continued to issue the edict on taking office. In principle the law contained in it was derived from the magisterial power. But the prætor's law-making was at an end. The edict was no longer the *viva vox juris civilis*. Henceforth the work of developing the law passed from the prætor to the classical jurists and the emperors.

The edict has been lost, and it is impossible to tell with certainty exactly what it contained. But Paul and Ulpian, among others, wrote lengthy commentaries upon it, and many passages from these are preserved in Justinian's Digest. From these and from other fragments the edict has been to a great extent reconstructed. The best attempt is that by Lenel, published in 1883. The general order is pretty well established, and was to a great extent followed in the Digest of Justinian.

Section 9.—*Senatus-consulta.*

During a part of this period the Senate was a legislative body, and *Senatus-consulta* are treated as having the binding force of laws. The Senate's ordinances as to the government of the provinces and other matters of public law had been recognised during the Republic as entitled to general obedience. And, in the sphere of private law, at the end of the Republic, the Senate had begun, if not to make laws, yet to dispense individuals from obedience to particular laws. The Senate also not uncommonly recommended the prætor to *make* by edict a change in the law, and the prætor generally

complied with such a recommendation. Under the Principate the emperor used the Senate as his mouthpiece or *prête-nom.* The genuine legislative activity of the Senate lasted only for about 180 years—*i.e.*, from about 26 A.D. to about 206 A.D. The Senate did not really exercise any initiative. The usual course was for the emperor to propose a measure, either coming himself to the Senate and making a speech to introduce it, or getting a quæstor to read a speech prepared by him. This *oratio principis in senatu habita* was adopted by the Senate as a matter of course, and generally passed in the identical words. Thus it happens that the historians often speak of the *oratio Severi* or *oratio Antonini* of a certain year, when they mean the *Senatus-consultum,* passed to give effect to the *oratio.* The Institutes[1] explain the legislative authority of the Senate by merely saying that when the population had become so great that it was difficult to assemble them all together, it seemed right to consult the Senate as representing the people.

Among the best known *Senatus-consulta,* I may mention—

(1.) Sct. *Velleianum,* A.D. 46, already referred to.[2]

(2.) Sct. *Claudianum,* A.D. 52, providing that a free-woman who continues to cohabit with a slave after being warned by the slave's master shall herself become a slave, and fall with her whole estate into the estate of the master of her paramour.

(3.) Sct. *Macedonianum, circa* 70 A.D., declaring that no action should lie either against father or son to recover loans of money made to a *filius familias.*[3]

(4.) The Sct. *Tertullianum, circa* 158 A.D., gave to mothers of three children, if the mother is freeborn, or of four children if the mother is a freedwoman, the *jus liberorum.* This entitled them to succeed to the estate of their children in preference to collaterals.

[1] I. i. 2, 5.

[2] *Supra,* p. 129.

[3] For exceptions see Moyle, *Institutes of Justinian,* p. 575.

(5.) The Sct. *Orfitianum*, 178 A.D., gave to the children of a woman who died intestate a right to succeed to her estate in preference to all agnates. Under the old law there was no relationship between mother and children. Children were not *sui*, and not agnates, unless indeed their mother had been *in manu*, and then she would have had nothing to leave, as her whole estate would have passed to her husband.

Section 10.—*Constitutiones Principum.*

The authority of the emperor to make laws is said in the *Institutes* to be based on the *lex regia de imperio*, by which it is said the people confer upon him all their own power, so that he makes law as their mouthpiece. This is an attempt at a philosophical explanation. As a matter of fact the declared will of the emperor was before very long—at anyrate before Gaius—regarded as having *legis vicem*.[1] The most general term for declarations of the imperial will was *constitutiones*—a word sometimes applied to decrees of the prætor and even to opinions of jurists. There seemed nothing novel or unconstitutional to the Roman mind in the emperor having this power, for, as we have seen, every magistrate who had the *imperium*, might issue an edict and compel obedience to it. But whereas in the case of the magistrate —*e.g.*, the prætor—the force of his edict depended on his own power to oblige people to conform to it, the emperor had the advantage that his orders were binding upon every other magistrate. The ways in which the emperor declared his will were various :—

1. *Edicta ;* 2. *Rescripta ;* 3. *Decreta ;* and 4. *Mandata.*

(1.) *Edicta.*

Every magistrate, and *a fortiori* the emperor, had the *jus edicendi*. The emperor's issuing an edict and expecting it to be obeyed shocked no one, and the reason why he adopted

[1] Gaius, Inst. i. 5.

the method in the early empire so little is that it seemed as easy to put his law in the form of a comitial law, or of a *senatus-consultum*—forms which were more imposing from their historical associations. In the earlier empire, the emperor's edict was not law after the death of the emperor who promulgated it. It might be renewed or tacitly kept in force by his successor, and in time came to be treated as continuing in force like any other law.[1] During the later empire the emperors legislated extensively by *edicta*.

(2.) *Rescripta.*

These are answers to legal questions submitted to the emperor for his opinion. Magistrates and governors of provinces who had difficult questions of law to decide, were encouraged to refer them to the emperor for solution. In this case, the emperor replied in a formal document giving his opinion and the reasons for it pretty fully. A rescript of this kind was called an *epistola*.

But even private individuals might petition the emperor for his opinion, and in replying to them, he generally gave his answer very briefly, and wrote it at the foot of the petition itself. This was called *subscriptio* or *subnotatio*. *Rescriptum* as a general term covered both. After the second century, A.D., it became a very common practice for a party to an action to obtain beforehand the emperor's opinion upon the point of law involved. This was given, as counsels' opinions are given now, upon the assumption that the facts were fully and fairly stated by the petitioner. The facts had then to be proved in the ordinary way before the judge, and he then applied the law as directed in the emperor's rescript. The emperor's law must be taken as sound, if the facts turned out to be as they had been stated to him. But it was often a matter of difficulty to know whether the emperor had not meant to lay down a general

[1] Karlowa, i. 647.

rule, which a judge ought to follow if the same point presented itself again. This was a matter of intention. The judge had to decide:—

First, Did the emperor who had given a rescript in a previous case intend to lay down a general principle of law?

Second, Was the second case really analogous?

These questions had generally to be determined by studying the language in which the rescript had been expressed. In many of them the emperor clearly gave an opinion limited to the special circumstances before him. If so, it was called a *constitutio personalis*. In others, again, his reasons seemed general in their nature, and applicable to similar cases in the future. These were *rescripta generalia*, or *constitutiones generales*. The rescripts of deceased emperors required, therefore, to be construed, and this was one of the duties of the jurisconsults under the empire.

In all this, it is not to be supposed that the emperors had the legal knowledge, or could spare the time, to give these numerous opinions on points of law. Just as the prætor in preparing his edict, had been wont to call in the aid of lawyers of repute, so the emperor had a *consilium* or board on which distinguished lawyers were members. This *consilium* sat in a room at the palace—the *auditorium principis* and considered all petitions, and drew up rescripts for the emperor to sanction. As a rule it was in points of detail that the law was modified by rescripts.

(3.) *Decreta.*

These are judgments rendered by the emperor in cases in which he sat as judge. The emperor might sit as a judge of first instance like the prætor, and some of the early emperors did this a good deal. Suetonius says in praise of Augustus "*Jus assidue dixit.*" But by the time of Domitian this had become unusual.[1] The emperors generally con-

[1] *Suet. Dom.* 8.

tented themselves with their appellate jurisdiction. This was based on their *tribunicia potestas.* The emperor might, if so requested, veto the judgment of any Court. He then examined the case and issued a *decretum.* Here as with rescripts the judgment might apply to the particular case only, or it might lay down a general rule. If it did it was binding law in future cases.[1]

(4.) *Mandata.*

These were official instructions given to dignitaries, especially to governors of provinces. They contain directions as to their conduct, and seldom touch private law. More often they contain provisions as to criminal or administrative law. Hence, in the Institutes, *mandata* are not included among the *constitutiones.* But occasionally a rule of law was made in such governors' instructions. *E.g.*, the rule that a governor was not during his term of office to marry a lady of the province.[2] Such a rule if intended to be general would be a binding law.[3]

Section 11.—*Responsa Prudentium.*

Augustus saw the importance of attaching to himself the leading lawyers[4] whose influence was considerable. He saw also the danger of allowing great weight to be given to the private opinions of men some of whom, like the great Labeo, were known to be ardent Republicans. He accordingly chose out some of the most distinguished lawyers, and gave them a quasi-official position somewhat analogous to that of a modern King's Counsel. He conferred upon his favourites the *jus respondendi ex auctoritate principis.*[5] The creation of this privileged class of patented counsel did not prevent their less favoured *confrères* from giving *responsa.* But the *responsa* of the jurists who had the *jus respondendi* carried

[1] Karlowa, i. 659. [2] Karlowa, i. 653. [3] D. xxiv. 1, 3, 1.
[4] D. i. 2, 48. [5] D. i. 2, 48.

with them a higher degree of authority. Indeed, it seems that if a party got a *responsum* from one of these official counsel it was binding upon the *judex*, provided the facts were proved to be as assumed by the counsel.[1] The *responsum* must be in writing and sealed, and given to the party. But it might happen that conflicting *responsa* were produced. Hadrian dealt with this difficulty by a rescript. He said if there were more *responsa* than one, and they all agreed upon the law, the judge was bound by this view. If they differed, he must use his own judgment. Some writers, notably Puchta,[2] think that Hadrian's rescript applied to the books of jurists living and dead, as well as their opinions given for the particular case in hand. But this hardly seems likely.[3] Our information is scanty as to the manner in which Hadrian's rescript was administered. Probably if one party brought a *responsum* in his favour this was accepted as sound law, unless his opponent produced another *responsum* in the opposite sense.[4] Muirhead suggests that the number of patented counsel was very small, and that the judge was only bound by a *responsum* in which they all concurred.[5] This is difficult to accept.[6]

Section 12.—The Proculians and the Sabinians.

The Augustan age saw a curious split among the jurists into two rival schools or sects. These came to be known by the names of the Proculians and the Sabinians. Curiously

[1] Karlowa, i. 660; Girard, *Manuel*, 67; *contra* Machelard, *Dissertations de droit Romain*, p. 654; Accarias, *Précis de droit Romain*, p. 59; Bruns, s. 47.

[2] *Inst.* i. s. 117.

[3] Karlowa, i. 660; *contra* Machelard, *Dissertations*, p. 662; Accarias, p. 60; Appendice I. by M. E. Bonnier to vol. ii. of Labbé's edition of Ortolan, *Les Instituts de Justinien*.

[4] Bonnier's Appendice I. to Vol. ii. of Labbé's Ortolan.

[5] Second edition, p. 293.

[6] *See* Krüger, *Rechtsquellen*, p. 113; Bruns, note by Pernice to sec. 47.

enough, neither school is named after its real founder. M. Antistius Labeo was considered the head of the Proculians, and C. Ateius Capito the head of the Sabinians. These two men were the most famous lawyers of the time of Augustus. They differed widely in political views. Labeo was a stalwart Republican, who viewed the rise of the imperial power with dislike and suspicion. When a motion was made in the Senate that the senators should take turns in standing guard over the Cæsar when he slept, Labeo said, "I snore, and therefore am not suited to be a guard in an ante-chamber."[1] Capito, on the other hand, was a pliable courtier, anxious to win favour with the new monarch. As a lawyer Labeo was by far the more distinguished. He was a voluminous writer, a man of wide general culture, and well versed in the Greek philosophy. His opinions are frequently referred to with great respect in Justinian's Digest. Capito is rarely mentioned in the Justinian texts, and but little is known of him. Labeo's follower, Proculus, gave his name to one school, and Sabinus, a disciple of Capito, to the other. A good deal of rather fruitless labour has been expended on the attempt to discover some broad lines of distinction between these two schools. We frequently read that the Proculian view upon some question was so and so, and that the Sabinian view differed from it in such and such respects. But many of the disputes were on very small points, and it is difficult, if not impossible, to detect any underlying differences of principle. Karlowa thinks that the Proculians clung more closely to the legal doctrines of the Republic, and that the Sabinians were more inclined to the equitable tendencies of more modern times. Even so much is quite uncertain. The two schools continued to exist for a considerable time, for Gaius, whose Institutes were written about 161 A.D.,[2] reckons himself as a Sabinian, and speaks

[1] Roby, *Introd.* cxxv.

[2] *Ibid.* clxxxi.

of the writers of the other school—*diversæ scholæ auctores*—as still living. It is not at all improbable that each of the two schools became associated with a college, and that a succession of teachers and students at one of these *stationes jus docentium* kept up a traditional attachment to Sabinian views, while at the other *statio* they honoured the names of Proculus and Labeo. The opposition between the Sabinian and Proculian views was something like the vague rivalry between two neighbouring Universities such as Oxford and Cambridge, or Harvard and Yale.[1]

[1] See on this obscure subject Roby, *Introduction to the Digest*, pp. cxxiv. *seq.*; Karlowa, i. 664, where a good many examples of the controversies between the two schools are collected.

CHAPTER XVIII.

The Classical Jurists.

Section 1.—Julian, Pomponius, and Papinian.

We now come to the group of writers who are known as the classical jurists. It is from their works that Justinian's Digest and his Institutes are mainly compiled. The first, and one of the greatest of those whom we need mention, was Salvius Julianus. He occupied the highest offices of the state during the reigns of Hadrian and Antoninus Pius, being twice consul and finally *præfectus urbi*. Hadrian charged him with the important task of consolidating the edict. Julian published a still more important work called his *Digesta*, in ninety books. Like many of the great lawyers of this period, he was not of Roman birth. He was born at Hadrumetum, in the province of Africa. After him comes Pomponius, who contributed considerably to the *Digest*. A long extract from a work of his called the *Enchiridion* or Handbook is our principal authority for a good deal of the early history of the law. Except for an introductory passage from Gaius, it forms the whole of the Title *De Origine Juris*.[1] Pomponius seems to have been more esteemed as an antiquarian than as a practical lawyer, though some of his doctrinal writings are also referred to. Passing over some of the less known names we come to Aemilius Papinianus. Papinian is generally regarded as the greatest

[1] D. i. 2.

of all the Roman jurists. Justinian lavishes upon him such epithets as *acutissimi ingenii vir et merito-ante alios excellens*[1] *disertissimus, splendidissimus, pulcherrimus, summi ingenii vir*,[2] and so on. And in more modern times the great French lawyer, Cujas, has spoken of Papinian as "the greatest lawyer that has been or will be, as pre-eminent among lawyers as Homer is among poets."[3] The distinction of his career, the noble integrity of his life, and the courage with which he faced death rather than disgrace, all contributed to place Papinian on a plane by himself. And in comparing his writings with Paul and Ulpian—his only possible rivals among the Roman jurists—we have to remember that they were his pupils, and had absorbed his teaching.

Papinian flourished under Marcus Aurelius and Septimius Severus. He filled many high offices, including that of *magister libellorum*, or Master of Petitions—the officer who drew up the imperial rescripts for approval.[4] He was an intimate friend of Severus, and in 204 A.D., held the great office of Prætorian Prefect. This dignitary was a kind of grand vizier who was at the head of every department of state. He was at once prime minister, supreme judge, and adjutant-general. Sometimes the office was put in commission, or held by two or three Prætorian Prefects.

Papinian accompanied the Emperor Severus to Britain to suppress a rebellion, and a law of Severus dated at York in 210 A.D. was probably drawn by Papinian. For three years the two highest tribunals sat at York. Papinian, with Paul and Ulpian as his assessors sat on the bench there. As a recent writer on Papinian says, it was rather as if the House of Lords and the Judicial Committee were to sit at Uganda.[5]

[1] C. vi. 42, 30 ; *Const. Omnem*, secs. 1, 4. [2] C. vii. 45, 14.

[3] *Unus Papinianus erit, ut Homerus unus poetarum princeps, sic unus princeps jurisconsultorum Papinianus. Præf. ad Comment. in Quæst. Papin.* (ed. Mut. 1777). [4] D. xx. 5, 12, pr.

[5] Prof. N. J. D. Kennedy in the *Juridical Review* (Edinburgh), Vol. v. *p. 312.*

And Papinian, Paul, and Ulpian must have constituted as strong a Court as could be imagined. Severus at his death specially commended his sons Caracalla and Geta to the care of Papinian. The story goes that after Caracalla had murdered Geta, he called on Papinian to address the Senate in defence of the murder. Papinian replied, "Parricide is not so easy to defend as to commit." On account of his refusal, Caracalla caused Papinian and his son, who was a quæstor, to be killed. The excerpts from Papinian, 595 in number, are by no means so long as the extracts from Paul and Ulpian. But they quite bear out his reputation, and are admirable specimens of legal reasoning. In Justinian's time Papinian's *responsa* formed a main part of the work of law-students in their third year. The students at that stage were called *Papinianistæ*.[1] The course of study lasted then for five years.

Section 2.—ULPIAN.

Domitius Ulpianus was a Tyrian. He was guardian of the young Emperor Alexander Severus, and at the same time was Prætorian Prefect. In fact for some years, Ulpian virtually governed the empire. He incurred the hostility of the guard by taking away some of their privileges, and was attacked one night by some of the soldiers. He fled for refuge to the Palace, but was followed and slain there. His works were most of them written in the reign of Caracalla, between 212 and 217. He was a most voluminous writer. He wrote a commentary on the edict in eighty-three books, and one on Sabinus in fifty-one books, as well as many smaller treatises. Of these the best known is his Book of Rules—*Liber Singularis Regularum* —which was first printed in Paris in 1549. Ulpian is not, perhaps a writer of marked originality. He borrows, with

[1] *Const. Omnem*, sec. 4; See Roby's *Introduction*, p. 28.

great freedom, from earlier writers. But his works are remarkable for lucidity of style and arrangement. Mommsen says of the Rules—*Ulpiani Regulæ ea brevitate, perspicuitate, proprietate, conscriptæ sunt quam adhuc secuti sumus omnes, assecutus est nemo.* The extracts from Ulpian form the heart of the *Digest.* He is much more drawn upon than any other writer. He occupies one-third of its pages.

Section 3.—JULIUS PAULUS.

After Ulpian comes his contemporary, Paul, who was a Prætorian Prefect under Alexander Severus. Paul was a voluminous writer. Among his works I may mention *Institutionum Libri Duo, Sententiarum ad Filium Libri Quinque,* commonly called Paul's Sentences, and also a commentary on Sabinus. Paul was, possibly, as good a lawyer as Ulpian, but he had not Ulpian's grace of expression. His style is crabbed and difficult. There are 2081 extracts from Paul in the *Digest,* but their average length is less than that of Ulpian's 2464 extracts. Paul's proportion of the *Digest* is about one-sixth, so that Ulpian and Paul together wrote half the *Digest.* Paul's *Sentences* is a very valuable little work for the law of the classical period.

Section 4.—MODESTINUS.

After Ulpian and Paul there is only one writer who is reckoned among the classics, and he occupies a rank much lower than theirs. This is Herennius Modestinus, a pupil of Ulpian. He seems to have been a Greek, or at least from a Greek-speaking province, and some of the extracts from him in the *Digest* are in that language. He was teacher of the young Emperor Maximinus about 238 A.D. There are in the *Digest* 345 passages from Modestine. They exhibit him as a rather tiresome and quibbling kind of lawyer.

After Modestine there is a rapid decline, and no other name needs to be mentioned. This may be partly due to the fact that after the end of the third century the emperors discontinued making grants of the *jus respondendi*. Henceforth the imperial rescripts were the only *responsa* which were of authority.

Section 5.—GAIUS.

One jurist I have purposely omitted though his date is earlier than Papinian. This is Gaius. He occupies a somewhat peculiar position. Of the man himself we know nothing —not even his cognomen. Gaius is the same name as Caius, and is a prænomen. From internal evidence it seems that he lived in the reign of Antoninus Pius and Marcus Aurelius, and he must have survived 178 A.D., for he wrote a book about the Orfitian Senatusconsult which was passed in that year. His *Institutes* were published about 161 A.D., though the precise date is disputed. The peculiarity about Gaius is that his fame came to him so long after his death. There is a doubtful allusion to him by Pomponius, who speaks in one place of "*Caius noster*." But many writers think he means Caius Cassius Longinus.[1] Except for this, Gaius is never mentioned by his contemporaries or by the great jurists who succeeded him. Yet, suddenly, in the middle of the fifth century, nearly three hundred years after his works appeared, we find Gaius distinctly recognised as being in the same class with such luminaries as Papinian and Ulpian. And we find in Justinian's time, a century later, that Gaius' little work—his Institutes—is the text-book in the hands of all law students. Justinian's own compilers of the Institutes base their work on that of Gaius, and pay it the compliment of borrowing from it so freely that half of Justinian's Institutes is taken bodily from the older book.

[1] Karlowa, i. 720.

Why was Gaius so obscure in life, and so famous three or four centuries after his death ?

The probable explanation is that Gaius was not a statesman occupying a great position like Papinian, Ulpian, or Paul. Indeed he was so far from that rank that it is almost certain he never possessed the *jus respondendi.* He seems to have been a professor of law at one of the law-schools or *stationes jus publice docentium.* Gaius seems to have been familiar with Greek; he wrote a commentary on the provincial edict, and he is particularly full in his treatment of the law as it affects all peregrins or foreigners living at Rome. Mommsen has inferred from these facts that Gaius was a provincial, and probably an Asiatic professor of law, and he thinks there is some ground for supposing that he lectured at Troas in Asia. Karlowa[1] disputes this inference and thinks it more likely that Gaius taught at Rome, but perhaps at a law-school attended specially by provincials. But it is generally agreed that Gaius was a professor and not a statesman, and that his works slowly won their way by their intrinsic merit and did not possess at first such authority as belonged naturally to the writings of the leading men of the day like Papinian.

Besides his *Institutes* and his treatise on the *Edictum Provinciale,* Gaius wrote other works, and particularly one called *Libri rerum cotidianarum,* which afterwards went by the name of the *Aurea* of Gaius.

The *Institutes* has been thought from its style to be Gaius' notes for his own lectures. He is very cautious, and on controverted points seldom gives an opinion, but contents himself with stating the views held by the opposing authorities. The re-discovery of the long-lost MS. of the *Institutes* of Gaius is one of the romances of literary history. Considerable extracts from it existed in other compilations,

[1] I. 722.

specially in Alaric's Breviary, but the complete work had utterly disappeared. In 1816 Niebuhr, in passing through Verona, took the opportunity of glancing through the collection of MSS. in the Library of the Cathedral. He found among them a MS. of the Epistle of S. Jerome which he at once perceived to be a palimpsest—that is written over an older MS. The monks, as their manner was, had attempted to erase the old writing with pumice stone in order to use the parchment for copying S. Jerome. The first writing was very difficult to decipher, but Niebuhr just made out that it dealt with law. Being so well known as a scholar he got leave to borrow the MS. and sent it to Savigny for examination. It turned out to be the long-lost *Institutes* of Gaius. The Berlin Academy sent antiquarians to attempt to decipher it, but unfortunately one of them used such strong chemicals as to make it more unintelligible than before. A subsequent attempt to reproduce it by photography has been more successful, and it is now possible to make out the greater part of the work with the aid of many conjectures. The discovery really marks an epoch in the history of Roman law, for as Gaius states the law as it was four centuries before Justinian, we can compare his account with Justinian's, and in that way understand many things which before had been full of obscurity.[1]

[1] There is a voluminous literature about Gaius. I may refer particularly to Krüger, *Römische Rechtsquellen*, sec. 24.

CHAPTER XX.

The Fourth Period—The Absolute Monarchy, 284 A.D.–565 A.D. (Death of Justinian).

Section 1.—Absolutism.

From the accession of Diocletian in 284 A.D. to the end of our period the emperor is to all intents and purposes an autocratic sovereign. The republican checks altogether disappear.

The *Comitia* has faded away.

The Senate gets weaker and weaker, loses its imperial character more and more, and tends to become a kind of municipal assembly for the city of Rome. When Constantine founds the new Rome, or Byzantium, he furnishes it also with a Senate.

The old magistrates, consuls and prætors have only the shadow of their former power. The *prætor urbanus* and the *prætor peregrinus* are still judges in the city of Rome. But they are now only judges of first instance. An appeal lies from them to the *præfectus urbi.*

High above every power in the state stands the Emperor. No longer content to be the first citizen of the Republic—the *Princeps*—he has now come to be called *dominus*, even *deus*, and receives divine honours. Below him is an elaborate hierarchy of new officials by whom the work of governing the vast empire is carried on.

Section 2.—ITALY, A PROVINCE.

The whole position of Rome and of Italy has undergone a profound change. The provinces and subject states no longer look up to the Romans as to a sovereign people. The different degrees of citizenship—so to speak—the status of Latins, Junian Latins, peregrins, and so on have disappeared. For, some time between 212–217 A.D.,[1] Caracalla had given the full Roman citizenship to all the free inhabitants of the empire. Now the Romanised Teuton in Gaul and the Romanised Jew in Palestine are Roman citizens just as much as the natives of the capital. And Italy is merely one among many provinces.

Section 3.—THE DIVISION OF THE EMPIRE.

This new conception of the Roman Empire as an enormous and heterogeneous group of provinces all equally free, and all equally subject to the commands of the emperor and of the new bureaucracy, made it seem desirable to reorganise the whole system. Moreover, the empire was exposed to constant attacks from the Teutons on the north and west, and from the Parthians and the Persians on the east. It was impossible for an emperor, living at Rome, to defend the empire at all its vulnerable points. Diocletian devised an elaborate scheme of administration for the whole empire. He divided it into four grand divisions called præfectures, and set a *præfectus prætorio* over each. The præfectures were sub-divided into dioceses, each governed either by the *præfectus* in person or by a *vicarius*. The præfectures were —(1) the East; (2) Illyricum; (3) Italy; and (4) Gaul.

The præfecture of the East included, speaking roughly, the modern countries of Palestine, Egypt, Asia Minor, and part of Turkey and Roumania. Illyricum included Greece and the Balkan States, so far as not in the East. Italy

[1] See Muirhead, second edition, pp. 318 *seq.*

included, besides the peninsula, the province of Africa. The præfecture of Gaul covered Spain, France, Britain, and Germany, so far as they had been subdued.

The two eastern præfectures—*i.e.*, the East and Illyricum, and the two western—*i.e.*, Italy and Gaul, were, respectively, to be governed by an Augustus assisted by a Cæsar. The two Augusti were to be joint-emperors, each administering a separate part of one empire. Legislation was to be agreed to by both, and to apply to the whole empire. This grand scheme was not uniformly carried out. Sometimes the two halves are reunited again under a single ruler. The last emperor to rule the whole empire alone was Theodosius the Great. At his death in 395 A.D., he divided the empire again between his two sons, giving the West to Honorius and the East to Arcadius. After that time there are really two empires—the empire of the East, with its capital at Constantinople, and the Empire of the West, with its capital at Rome, or more often at Ravenna.

Such, in brief outline, is the history of the division of the empires.

During the absolute monarchy the only source of law is the Emperor. He declares his will in rescripts or in edicts. Speaking broadly, all important changes in the law are made by edicts, *leges edictales*, addressed to the Senate, to the whole people, or, very often, issued to the prætorian præfects, with instructions to publish them in their respective jurisdictions.

Section 5.—The Authority of the Jurists in the Later Empire.

After about 250 A.D., the date of Modestinus, there were no great jurists. The practice of conferring the *jus respondendi* died out. This may have been due in part to the want of great lawyers, and in part to the disinclination of

the emperors, who were getting more and more autocratic, to give to another an authority which they could exercise themselves. It seemed to them unfitting that a private citizen should be a *conditor et interpres legum.*[1] Instead of obtaining a *responsum* in their favour from a living jurist, the lawyers got into the habit of relying on passages from the works of the great jurists of the past. They supported their arguments by citations from Papinian or Ulpian, or from one of the famous commentators. The works of these old writers were now spoken of as *jus*, and were relied upon as absolutely correct. The old *leges* or *edicta* or *senatus consulta* were never looked at. They were taken as they stood in the writings of these commentators. But the classical jurists were numerous. They did not always agree in their views, and the unlearned *judex* was often greatly perplexed to know which guide he ought to follow in forming his decision. As to Papinian, the highest authority of all, there was a peculiar difficulty. His pupils, Ulpian and Paul, had annotated his writings, and had very often dissented in the notes from the opinion of the master given in the text. Was the judge, in such a case, to prefer Papinian's view or Ulpian's? Constantine, in 321 A.D., came to the help of the distracted judge by enacting that the notes of Ulpian and Paul should be of no authority, and must be disregarded altogether.[2] He also enacted, in 327, that Paul's *Sentences* should be a work of authority.[3] But a more decided and detailed attempt to define the authority of the jurists was made a century later. This was the law passed in 426 A.D. by Theodosius II. and Valentinian III., and generally referred to as the Valentinian Law of Citations.[4] It provided that for the future five jurists should be of paramount authority. All their writings are declared to be authoritative. The select five are Papinian, Paul, Gaius,

[1] Karlowa, i. 932.
[2] Cod. Th. i. 4.
[3] *Ibid.*
[4] See the text in C. Th. i. 4, 3.

Ulpian, and Modestine. It is expressly declared that Gaius is to have the same weight as the others. This implies that he had hitherto been in an inferior position. But not only were the great five to be of authority—they were to give authority to all jurists whom they cited. If Paul cited a passage from Marcellus, this was sufficient to make all the works of Marcellus authoritative. But this was subject to the condition that the accuracy of the passages cited from the old authors should be proved by producing the manuscripts of their works—"*si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur.*" The precise sense of the words "*codicum collatione*" has been much disputed. It appears to mean that before a passage from Marcellus is to be accepted as binding, two manuscripts, at least, of Marcellus must be produced in order to see if the passage is genuine.[1] But the object of the law seems to have been to make the works of the great five practically the sole authorities. The emperors did not like to take away the authority of such famous lawyers as Scaevola, Sabinus or Julian. But manuscripts of their works were rare, and they were, in practice, unknown, except by the passages which Ulpian or one of the classical jurists had cited from them. To say to a lawyer "you may refer to Marcellus, but you must show me a manuscript or even two manuscripts of his work," was practically to exclude Marcellus, for the condition could hardly ever be fulfilled. Indeed, it was only in the large cities, or at the law schools that manuscripts of the great jurists could be found. In the country the lawyers and the judges had to get on with hardly any books. The ordinary working library of the country lawyer consisted of Gaius' *Institutes* and Paul's *Sentences*.[2] After fixing what books might be referred to, the Valentinian Law dealt with conflicts of opinion among the authorities, by providing that

[1] See Roby, *Introduction*, lxxxv. ; Krüger, *Rechtsquellen*, p. 263.
[2] Bruns, sec. 67.

the judge was to accept the view of the majority. If the jurists expressing an opinion upon the point were equally divided, and Papinian had given his view about it, the side which included Papinian was to prevail. It was only in cases of equality, when Papinian was silent, that the judge could use his own discretion.

This cast-iron rule, which reduced the function of the judge to the mechanical art of counting the votes of legal writers two hundred years old, points unmistakably to a period of great decay. There was no modern authority to be compared in weight with these *veteres*, and there were no judges who could be relied upon to come to a sound conclusion if they were left to exercise their own discretion.

Justinian's *Digest* was compiled from the authors chosen in the Valentinian Law—either the great five, or some writer whom they cite. But he did not bind down his compilers by the same iron rules as had been imposed on the judges by the Law of Citations. The collation of manuscripts was not insisted on; the compilers might, as a modern judge may, accept the view of a single writer, even against the great Papinian himself; and lastly, the notes of Paul and Ulpian on Papinian were not to be thrown out of account.[1]

Section 6.—State of the Empire at the Time of Justinian.

The great compilations of the Roman Law were made at Constantinople. Before the death of Theodosius in 395 A.D., he divided the empire into two parts, assigning one to each of his two sons, giving the West to Honorius, and the East to Arcadius. Henceforth there is a Western Empire, with Rome, or sometimes Ravenna, for its capital; and an Eastern

[1] See the *De Conceptione Digestorum* (first constitution at beginning of *Digest*).

Empire, of which the capital was Constantinople. Both had reached, long before the time of Justinian, a condition of great feebleness. Italy was occupied over and over again by hordes of barbarians, who at first contented themselves with sacking the country and then retiring with their booty, but as time went on became more exacting, and established themselves on the land. In 410 A.D. Alaric the Goth appeared with his army before the gates of Rome, and sacked the city. The Goths under his successor occupied Gaul, and established there three kingdoms. The Franks seized the north, the provinces near the Loire and the Seine; the Burgundians the east of Gaul; and the Visigoths the south. In 455 Rome was again sacked by the Vandals under Genseric. After that time the Western Empire languished on nominally for twenty years. The barbarians made and unmade the emperors. The last of these phantom holders of the imperial dignity was Romulus Augustulus, son of an ambassador of Attila, King of the Huns. He was soon dethroned by Odoacer, and Italy was divided among the barbarians. The Western Empire came thus to an end in 475 A.D., half a century before Justinian's compilations. The Eastern Empire, though frequently on the verge of dissolution, managed to drag on to a much later date. It was not finally destroyed until 1453 A.D., when the Turks took Constantinople.

Section 7.—JUSTINIAN, B. 482; IMP. 527; D. 565.

Justinian, it has been said, rose from an Illyrian hut to the Imperial throne. He was a Slav, and his real name was Uprauda. He was born in 482 A.D., on the borders of Thrace and Illyricum, at Tauresium, near the site of the present Sofia, in the country now called Bulgaria. His marvellous rise was due in great part to the equally marvellous rise of his uncle Justin. Justin was a military adven-

turer who had become prætorian prefect, and by the favour of the soldiery had made himself emperor. Having no children of his own, he had long before this sent for his nephew, Uprauda, to Constantinople, and had given him the best education, and treated him as his son. Justin himself could not write his name. Uprauda took his uncle's name with the suffix "ian"—the mark of adoption. In 527 he was raised by his uncle to the position of joint-emperor, and a few months later, on the death of Justin, Justinian was allowed to succeed him. He was then forty-five years of age. He was married to Theodora, an actress who had led an infamous life. Justinian had persuaded Justin to repeal the law forbidding senators to marry actresses. Theodora was created his colleague on the throne, and the oath of allegiance had to be taken before both. The empire in Justinian's day was in a state of corruption and decline. Of the ancient Roman Empire nothing but its vices had been preserved at Constantinople. Society, rotten to the core, was divided into different religious sects, and into factions called the blues and the greens, which strove with one another with indescribable violence.

Justinian himself was a rank persecutor and strong partisan. He ordered a cruel massacre of all the Samaritan Jews who had been concerned in a rebellion in Palestine. When he began his reign, Africa had been seized by the Vandals, Spain by the Visigoths, Gaul by the Franks, Burgundians, and Visigoths, Italy by the Ostrogoths, and other parts of the West by other tribes of barbarians. But for a time, by the help of his great general, Belisarius, the armies of Justinian achieved much success. The empire of the Vandals was destroyed, Africa again made a province, Sicily recovered, and the Goths driven from Rome. Belisarius in his old age fell into disgrace, was accused of treachery, and stripped of his honours. He was succeeded as commander by the eunuch, Narses. Narses completed the reconquest of Italy,

and was created viceroy or exarch of that country. He established his capital at Ravenna. But in the East Justinian was less fortunate. He had several times to save himself from destruction by buying off Chosroes, the Persian king, and he ended by paying an annual tribute to the Persians, the Huns, and the Saracens.

But Justinian aimed at success in other ways, as well as by arms. He was a man of restless ambition, of great physical strength, full of new plans, but childishly vain. His buildings perpetuate his name more than his wars; his laws more than his buildings. He built an enormous number of churches and public buildings all over the empire. The most famous of all was the great church of St. Sophia, which the Turks have turned into a mosque. It is said that Justinian exclaimed when St. Sophia was finished, "Solomon, I have surpassed thee!" and that he caused to be set up a statue of Solomon looking with sad eyes at Justinian's work, which threw his own temple into the shade. This boast is not without much justification. A high authority on architecture says, "There was nothing erected during the ten centuries from Constantine to the building of the great mediæval cathedrals which can be compared with it. Indeed, it remains now an open question whether a Christian church exists anywhere, of any age, whose interior is so beautiful as that of this marvellous creation of old Byzantine art."[1]

Tribonian used to flatter the vanity of Justinian by telling him that he would never die, but would be translated to heaven, and by calling his laws "divine oracles."

Like Henry VIII. and James I. of England, Justinian was a great theologian, and imagined that he could settle disputed points of doctrine by his *ipse dixit*.

But it is on his legislative works that Justinian's fame

[1] Fergusson, *History of Architecture*, vol. ii. p. 444.

rests. He found the law a chaos. To discover what the law was upon any point, it was necessary to ransack the *leges* and *plebiscita* of old Rome, the prætors' edicts, thousands of law books of greater or less authority, and a vast number of imperial laws of earlier emperors. He left it a system so well ordered and so sensible that his compilations have shaped the law of the civilised world. How much credit is due to the emperor himself it is impossible to say. Tribonian was his great lieutenant in this work of rearranging the Roman Law and putting it into a form adapted for the needs of that time. But Justinian's name will always remain associated with the Roman Law, just as the name of Napoleon is associated with the French code.

CHAPTER XXI.

THE CONTENTS OF THE *CORPUS JURIS*.

Section 1.—*CORPUS JURIS*.

THE *Corpus Juris Civilis Justiniani*, in the form in which we now have it, consists of four parts :—

(1.) The Institutes—*Institutiones ;*

(2.) The Digest, or Pandects—*Digesta seu Pandectæ—i.e.* collections ;

(3.) The Code—*Codex ;*

(4.) The Novels—*Novellæ Constitutiones.*

The name *Corpus Juris Civilis* is not very old. It was first used by Denys Godefroi in his famous edition of 1583. It was introduced to distinguish the work from the compilation of the Canon Law called the *Corpus Juris Canonici.*

Section 2.—THE INSTITUTES.

The Institutes is a brief manual of the whole law. It was published 21st November, 533 A.D. Justinian tells us in the *Prooemium* that he meant the Institutes to be a text-book for students. It was compiled by a commission of three—Tribonian, Theophilus, and Dorotheus. Probably Theophilus and Dorotheus, who were both professors of law, did all the work of compilation, and Tribonian acted as chairman and decided doubtful points. The Institutes is founded mainly upon an earlier book of the same elementary character, the Institutes of Gaius. The compilers cut out all that was antiquated, and put in from the Digest and the Code what

was necessary to bring the book up to date. There is little citation of authority, and questions of difficulty are, so far as possible, avoided. The Institutes has remained the usual text-book for students. This is in some respects to be regretted, as it contains a good deal of matter which is now only of antiquarian interest, and it is not very full upon subjects like obligations, which the modern law has taken chiefly from the Digest. A text-book of the same size written for students of the twentieth century instead of the sixth would contain more of the living Roman law. Upon the other parts of the law it is still a convenient handbook.

It must not be forgotten that the Institutes, though intended for use as a text-book, was binding law, and had the same statutory force as the Digest or the other parts of the Corpus.

The mode of citation by the old writers is *Instit. lib.* 3, *tit.* 1, *sec.* 2, *de hæreditatibus quæ.* The English way is shortest and best—viz., *Inst.* iii. 1, 2. In Germany they cite thus: *sec.* 2, I. *de hæreditatibus quæ* (i. 3).

The Institutes is divided into four books; each book into titles; and each title into numbered paragraphs. The first paragraph is called the *principium*—cited as pr.—and the second paragraph is number 1.

Section 3.—THE DIGEST.

The Digest is a work of great bulk compared with the Institutes. It consists of selected passages from the works of legal writers of admitted authority. If in compiling a work like the *Pandectes Françaises* the editors had simply arranged under each heading—*e.g.*, Gifts *inter vivos*—a string of passages from Pothier, Toullier, Demolombe, or if the *Encyclopœdia of English Law* consisted of a catena of extracts from Littleton, Blackstone, Story, and other sages of

the law, you would have a work on the plan of Justinian's Digest. The arrangement under each title of the passages themselves is rather perplexing. I shall refer to it later.

The Digest was published, less than a month after the Institutes, on 16th December, 533 A.D. It is divided into fifty books; each book into titles; each title into "*leges*" or fragments; and the "*leges*" into a *principium* and numbered paragraphs. Each *lex* is the whole of a clipping or extract from some writer, and begins with his name and the reference to the book. *E.g.*, *Ulpianus libro vicesimo nono ad edictum*, and then the extract.

In citing the Digest, the old writers followed the awkward plan of giving the subject of the title and the number of the fragment and of the paragraph, without giving the reference to the book or the title. *E.g.*, ff. L. 2 *Qui petant tutores*; ff. L. 1, 85 *De reg. jur.*[1] This was well enough when the Digest was continually in the lawyer's hands, and he knew where the titles came. Now it is inconvenient. In England the Digest is cited thus: D. 17. 1. 2. pr. The Germans cite L. 2 pr. D. *mandati* (17, 1), or Fr. 2 pr. D. 17, 1 (*de mandatis*). The curious symbol ff. is very old as a reference to the Digest.[2] It is a sort of conventional way of writing a "d" with a line through it.[3] Some have said it was for π (*pandectæ*), but that is a mistake, for we find *ff*^{orum}, not ^{arum}, and the process of development from đ to *ff* can be traced in the MSS.[4]

Section 4.—THE CODE.

The Code was published about a year after the Digest, 16th November, 534 A.D. It is really a second edition,

[1] See Civil Code of Lower Canada, Arts. 251, 1062, references by the Commissioners.

[2] It is used in Godefroi's edition.

[3] Cp. the symbol &c., for etc., Roby, ccxlv.

[4] See for other modes of citation employed by some writers, Roby, *Introd.* ccxlv.

codex repetitæ prælectionis. The first edition was published in 529, and was the earliest of all the compilations. But it was superseded by the second edition, compiled after the Digest, and this second edition is the only one which has come down to us.

The Code is a collection of decrees and laws enacted by the emperors, and of rescripts issued by them. The most general word for such laws is *Constitutiones.* The emperors being despotic rulers, made a law simply by issuing a proclamation. The Code corresponds to the collections of *Edits et Ordonnances* of the French kings, which were to all intents and purposes as efficacious as the decrees of an absolute monarch, though in France there were a few formalities such as registration by the several *Parlements.* But the form of the Code differs from a collection of *Edits* in this, that in the Code most of the laws are in the form of answers to particular individuals, and addressed to them. The French kings did not issue rescripts of this kind.

Many of these *constitutiones* are given in the Code in an abridged form. The work is divided into twelve books, each book into titles, which are much shorter than those of the Digest, and each title into *leges* or *constitutiones.* If the *lex* is long it is also divided into paragraphs. By the old writers it is cited thus : Cod. L. 2 *de testibus.*[1] The English way is Cod. 4, 34, 11. The Germans cite L. 11, sec. 1 C. *depositi* (4, 34) or c. (for *constitutio*) 11 *depositi* (4, 34).

Each *constitutio* begins with the name of the emperor who issued it, and that of the official or other person to whom it is addressed. They are arranged chronologically, and, what would be very odd now, the compilers had the power to alter and correct the constitutions which were inconsistent with later ones. They are often quite short. *E.g.*, this is the whole of a title. *De Confessis. Imp*

[1] See Civil Code of Lower Canada, Art. 232.

Antoninus A. Juliano. "Those who have confessed judgment are in the same position as those against whom judgment has been pronounced. Accordingly you have no right to claim to withdraw your confession now that you are being forced to pay."[1]

The Code is for us a book of far less value than the Digest. A good deal of it consists of public law, criminal and ecclesiastical, which is not applicable to modern times. And a great many constitutions are answers as to particular small points. But sometimes we have to refer to the Code for important discussion of general principles.

Section 5.—THE NOVELS.

The Novels did not form part of the original compilations of Justinian, for the sufficient reason that they were not written until after its publication. They are, in fact, a supplement to the Code consisting of the laws made by Justinian after the issuing of the Code. The full name for these later laws is *Novellæ constitutiones post codicem.* They extend over the years 535–556. A good many are undated. One or two are put by some as late as 565—the year of Justinian's death. The Novels are addressed to some one or other of the high officials of the empire, and contain the emperor's instructions upon some public matter. A great many of them deal with ecclesiastical laws. As Greek was the language of most of Justinian's empire, it is natural to find that most of the Novels are in Greek. In many cases they were not intended to lay down a law for the whole empire, but to contain instructions as to what was to be done in some particular province. A few were published both in Greek and Latin, and those intended for the Latin-speaking provinces—viz., Illyricum, Africa, and Italy, which

[1] C. 7, 59.

Justinian had for a time won back from the Goths, were in Latin only. Most of them are addressed in the first instance to the *præfectus prætorio Orientis*—the highest dignitary in the official hierarchy. His duty was to transmit them to the *rectores provinciarum*, by whom they were posted up as official proclamations.[1] The most important of the Novels dealing with church matters were addressed first to the Patriarch of Constantinople. Justinian had intended to make an official collection of all his Novels. But this he did not carry out. But collections of them were made by the lawyers for their own convenience. Three of these private collections of Novels have come down to us. They are :—

(1.) The *Epitome Juliani.*
(2.) The *Authenticum.*
(3.) The collection of 168 Novels.

The *Epitome* is an abridged Latin translation of 124 Novels. It includes a few Novels which were Latin originally. It was made by Julian, a professor of law in Constantinople, and dates from Justinian's own time. It was probably intended for use in the Province of Italy.

The *Authenticum* or *Versio Vulgata* is a fuller Latin version of 134 Novels. This was the collection used in Europe during the Middle Ages. It is given in the new stereotype edition of Schoell, as well as the third collection. It dates also, in all probability, from Justinian's time, and very likely was made by his instructions, with a view to official publication in Italy.

The third and fullest collection of 168 Novels gives the Greek Novels in the original. Of these, 152 are genuine Novels of Justinian, four (140, 144, 148, and 149) are by Justin II., who succeeded him, and three by Tiberius II. ; three (161, 163, and 164) belong to a collection of edicts

[1] See Karlowa, i. 1019.

generally printed as a supplement, four occur twice over, and two are edicts of the prætorian præfect.

Many of the Novels deal with ecclesiastical law, or with administration. But some of them make important changes in the private law. In particular, the Novels completely recast the law of succession. Novel 118 becomes the leading text upon that great branch of the law. The law of succession in most of the countries of Europe is largely founded upon Novel 118, though feudalism introduced many changes.

The Novels are not divided into books. They are cited thus : Nov. 118, cap. 3, sec. 1.

CHAPTER XXII.

JUSTINIAN'S CODIFICATION AND THE WORKS FROM WHICH IT WAS COMPILED.

Section 1.—*JUS VETUS* AND *JUS NOVUM.*

EAVING out of sight the Novels, which are merely supementary to the Code, and the Institutes, which is a short xt-book abstracted from other parts of the Corpus, and tended to be an introduction to the study of the Digest, see that Justinian's two great books are first, The Digest, d second, The Code. Each of these is intended to be a dification of one of the two main divisions of the law ich presented themselves in the time of Justinian. These re—(1) *Jus* or *Jus Vetus*, and (2) *Leges* or *Jus Novum.*

The lawyers of the sixth century had to find their law her in the books of certain famous lawyers of a former y, called the classical jurists, or else in some enactment ade by an emperor. The law which was laid down by the l writers they called the *jus*. *Jus* is equivalent to jurisudential law. The laws made by the emperors were lled *leges* or statutes, to distinguish them from the comon law, if we may so call the *jus vetus.*

Now the Digest is a codification of the *jus*, and the Code a codification of the *leges.*

Section 2.—COMMON LAW AND STATUTES.

The Digest corresponds in a general way with the Civil de of countries such as France or Italy. It is a condensa-

tion of an immense mass of law itself derived from various sources, but taken at the date of codification from certain authors of established reputation. The civil codes of Europe are much more abstract and much shorter than the Digest, because instead of giving the string of passages from authorities in support of a particular proposition, the codifiers merely state the proposition in its naked form. The fact that the Digest gives the *ipsissima verba* of the writers instead of condensing what they say and stating the result, makes the Digest much more lively and varied than a modern code can be. The law which was codified in the Digest had been made in a variety of ways. Part of it was really statute law, laws passed by the old legislative bodies of the Republic, or by the Roman Senate during both the Republic and the early Empire. But practically its source was disregarded. It was accepted because it was laid down by Papinian or Ulpian. The line of these great writers was long closed. The latest author cited in the Digest is Arcadius, whose date is about 339 A.D.—*i.e.*, roughly, 200 years before the Digest was compiled. The bulk of the Digest is taken from writers a hundred years earlier than Arcadius, and they often stated law which had been accepted for centuries before them. It is not curious, therefore, that in Justinian's time they called the law of the jurists *jus vetus.*

Of the *leges* the bulk consisted of constitutions made by the later emperors coming down to Justinian. Compared with the *jus*, it was most of it modern, and was not unnaturally called *jus novum.*

Speaking roughly we may say that the Digest was a work on the same plan as the Civil Code of France or of the Province of Quebec, which also contains a great deal of law, the origin of which is lost in antiquity. The Code, on the other hand, was not very unlike an official edition of revised statutes. It consisted of particular enactments abridged and

re-arranged. Each enactment had a known date and origin, and its origin was not extremely remote. A still closer analogy may be found in the division between common law and statute in the English law. The Digest was a systematised dictionary of the old common law, and the Code was an edition of statutes revised and abridged by authority.[1]

Section 3.—THE CODE.

The work of codifying the *leges* or imperial enactments was facilitated by the fact that already several collections of these had been made. The earlier compilations were :—

(1.) The *Codex Gregorianus.* This is a collection of imperial laws made by a certain Gregorianus of whom nothing more is known. It was published about 295 A.D.

(2.) The *Codex Hermogenianus*, which was a supplement bringing the code of Gregorian down to date. When it was published is not certain. It may be as late as 365 A.D.

We do not possess either of these codes in their original form, though a good many fragments of them remain in various collections, especially in the work called Alaric's Breviary. They must have been very voluminous, for Justinian's Code gives some 1200 rescripts by Diocletian and Maximian alone, and it is not likely that he had any other source for them than the Hermogenian Code. So far as we know Gregorian and Hermogenian were both private lawyers who made these collections for the use of the profession.[2] They were not issued under the imperial authority. But they seem to have been so carefully made and so useful that they came to be regarded as of the highest authority, and to be in constant use in the Courts, both in the East and

[1] See Brunner, *Deutsche Rechtsgeschichte*, i. sec. 50.
[2] Karlowa, i. 941 and 959.

the West. They were superseded in the time of Justinian by being taken into his Code.

These two old collections of imperial laws were made use of by Justinian in his Code. But, rather curiously, they were before his day included in the *jus* and not in the *leges*.[1] The reason for this is not very clear. It may be that they were so treated because the collections of Gregorian and Hermogenian were not official. This is confirmed also by their position in the work called Alaric's Breviary, which I shall speak of more fully later. That work consists of two parts—(1) the *leges*, (2) the *jus*; and the extracts from the Gregorian and the Hermogenian Code are given in the second part just as if Gregorian and Hermogenian had written and not merely arranged the laws which they give in their collections.[2] And an additional reason may have been that they were collections chiefly of rescripts and not of *leges edictales*. After the time of Constantine the emperors legislated extensively by lengthy proclamations called sometimes *leges generales*, sometimes *edicta*. Before his time there had not been much direct imperial legislation. The emperors either clothed their laws in the forms of *senatus-consulta*, or else issued rescripts generally dealing with some particular point raised by a petitioner. The *leges* or *jus novum* consisted of these imperial laws issued by Constantine the Great and his successors.[3]

Section 4.—Codex Theodosianus.

A third compilation of imperial laws of greater importance than the Gregorian and Hermogenian is the Codex Theodosianus. This was a code prepared under the direction of Theodosius II., Emperor of the East, and published in 438

[1] See Puchta, *Inst.* i. 134; Karlowa, i. 931.

[2] See Glasson, *Hist. du Droit*, i. 214, note; and Brunner, *Deutsche Rechtsgeschichte*, i. sec. 50.

[3] Karlowa, i. 939, 945.

A.D. Valentinian III., the Emperor of the West at the time, agreed that the Code should have authority in the West also. It was also arranged that laws subsequently promulgated by either emperor should be communicated to the other, who might, if he chose, proclaim them as law in his own dominions. This arrangement was acted upon, somewhat fitfully, until the downfall of the Western Empire in 475 A.D.

The *Codex Theodosianus* was a work of great size in sixteen books, and gave constitutions from the time of Constantine down to its date. We do not possess it in its complete form, but a large part of it has been discovered in recent times, and it is a valuable work, throwing much light on the state of the empire in the fifth century. Much use is made of it in the interesting book of Mr. S. Dill—*Roman Society in the last Century of the Western Empire* (London, 1898). The separate constitutions promulgated after its date down to the fall of the Western Empire were called the *Post-Theodosian Novels.*

It is interesting for us to notice that the old French law is based upon these earlier codes, especially the Theodosian, and not upon the compilations of Justinian. This is because Gaul had ceased to be a province of the empire, and had been overrun by the barbarians after Theodosius, but before Justinian.

Section 5.—THEODOSIAN CODE IN GAUL.

The *Corpus Juris* exercised a great influence on the French law from the twelfth century onward, and the learned lawyers introduced from it into the French law the main doctrines of obligations, besides much else. But in the fifth century the great authority was the Code of Theodosius. Gaul had by that time assimilated in a remarkable degree the civilisation of Rome. The immense mass of the population remained Celtic. The Roman element was composed of

a small class of officials, a few merchants, and here and there a group of soldiers to whom grants of land had been made.[1] But the Celts seem to have had a pliability of nature which enabled them to become Romanised more quickly and more profoundly than other races which Rome had conquered. The Latin language became widely used, and was made compulsory in the Courts. After the famous law of Caracalla,[2] by which all free inhabitants of the empire were granted all the rights of Roman citizens, the Celtic laws rapidly disappeared. Some local peculiarities in the law of landownership remained, but in general the whole country became subject to the Roman law. The works best known and most used in Gaul were the Codes of Gregorian and Hermogenian, the Institutes of Gaius, and the Sentences of Paul. When the Theodosian Code came out, part of Gaul was already occupied by the Visigoths, the Burgundians, and the Franks. But the Theodosian Code at once took effect in the centre of Gaul and on the left bank of the Rhone. And so strong a hold had the Roman law obtained upon the country that, as we shall see, the barbarians themselves allowed their new subjects to retain it. Of this law which survived the conquest, the Theodosian Code formed the most important part.[3]

The Code of Justinian, therefore, was compiled of imperial laws taken from these three earlier codes, and of separate enactments, issued in the East from 476 to the date of Justinian's own compilation. The Code was prepared by a commission of ten members, most of whom were high officials, but including Theophilus, a professor of law in Constantinople; two eminent advocates, and Tribonian. They were empowered to leave out all enactments which had become obsolete, to abridge freely those which they included, and to remove inconsistencies between earlier and later laws.

[1] *See* Glasson, *Histoire du droit, &c.*, vol. i. p. 191.
[2] *circa* 212 A.D.
[3] See Glasson, *op. cit.* i. 215.

The *leges* having been collected to so great an extent in the earlier codes, it is not so surprising to find that Justinian's Code took only a little over a year to complete. It was declared that it should now supersede all the law which it consolidated. Henceforth all reference in the Courts to the earlier enactments was prohibited. It was not permitted to refer to the law in its original shape as a means of interpreting the law as abridged and amended by the codifiers. The Code and the Code alone was now to be the statute-book of the empire. As I have already said, this first edition of the Code was soon superseded by a second which came out in 534 A.D., after the Digest. It is this *Codex repetitæ prælectionis* which we have.

Section 6.—Compilation of the Digest.

The preparation of the Digest was a work of much greater difficulty. A vast number of legal treatises and text-books existed. They were, naturally, of very unequal value, and contained, like modern law-books by different authors, innumerable passages which sometimes were flatly contradictory and more often differed from each other in a slighter degree.

Many of the MSS. were extremely rare; still more were very costly. No library contained anything like all of them, and most lawyers had to work with the aid of very few books. It continually happened, in the more remote parts of the empire, that cases had to be decided without either the judge or the counsel being able to refer to works which might have thrown great light upon the point at issue. Tribonian, whose own library was one of the finest in existence, estimated that there must be about two thousand books which ought to be gone through if the legal literature was to be fully examined.

Section 7.—*Quinquaginta Decisiones.*

Before attacking this mass of material, it was thought well to clear the ground. There were a large number of well-known moot-points of law about which the lawyers had wrangled for generations. The Commissioners would be certain to differ about some of these, and it seemed desirable to relieve them of the responsibility of deciding them. Justinian therefore published a number of rulings by which he settled for ever these old controversies, and he afterwards directed the Commissioners to adopt his view as to all these points. This little book was called the *Quinquaginta Decisiones.*[1] We do not possess it, but we know from references in the Institutes and the other books what some of these old moot-points were.[2]

Section 8.—Method of Compilation.

These preliminary difficulties being cleared away, the work of compiling the Digest was at once taken up. Its object was to reduce the chaotic mass of law books into an ordered system. Suppose—*e.g.*, a lawyer had a question about a right of way. As things were, he might consult the works of, say, Papinian, Paul, Gaius, and Ulpian. They might not entirely agree upon the point. Moreover, Gaius would be a little fuller with regard to some one aspect of the matter, and Paul more complete on another side of it.

Now the scheme of the Digest was for the Commissioners to ransack all the writers of authority who treated of right of way; to decide in cases of conflict which opinion was the sounder; to put down the best and fullest statement of the law, which might be—*e.g.*, by Papinian, and to supplement it

[1] Karlowa, i. 1007.

[2] See some examples in Ortolan, *Histoire de la Législation Romaine*, (ed. Labbé), i. p. 431.

by passages from Paul or others which contained something which Papinian had omitted. The Commissioners were to avoid repetitions, to reconcile inconsistencies, and to omit statements which were obsolete. But, so far as possible, they were to give the passage in the words of the original writer, and the reference to the work from which it was quoted. It was declared beforehand that the Digest was to consist of fifty books, and that when it appeared it was to supersede all the old law books. As a matter of fact, the compilers made use of the works of thirty-eight authors, and included passages from 1544 books (*i.e.*, rolls or volumes).[1] Henceforth it was not to be permissible to cite any of these works in Court. The Digest was to be the sole and final authority for the text of the jurists.

Section 9.—AUTHORS SELECTED.

The Commission to prepare the Digest consisted of sixteen members, besides Tribonian, who acted as chairman or superintendent. They were directed to make excerpts only from the works of writers whose authority had been officially recognised—*quibus auctoritatem conscribendarum interpretendarumque legum sacratissimi principes præbuerunt.*[2] These all belonged to the limited class of lawyers whose works had been stamped by the Valentinian Law of Citations as possessing authority. The name *juris auctores* was limited to this class, except that we must add the *veteres*, who lived before the days of imperial patents.

The compilers departed from their instructions to a trifling extent by admitting a few extracts from the works of Arcadius Charisius, and a larger number from those of Hermogenianus,[3] neither of whom were "patented counsel."

[1] Roby, *Introd.* xxiv. [2] Const., *Deo Auctore*, sec. 4.

[3] Possibly, but not certainly, the author of the *Codex*. See Roby, *Introd.* p. ccviii.

They also give a few passages from three of the old lawyers of the republic, who lived before this system of official recognition was introduced. But, with these slight reservations, we may say that the Digest consists of select passages bearing on the same subject taken from a group of lawyers who enjoyed a peculiar degree of authority.

Section 10.—The Arrangement of the Digest.

The general order of the Digest is not very clearly indicated, and there are so many digressions and interpolations that it is not always easy to see in what order the subject-matter is intended to be treated. It is very different from the simple division of the Institutes—treating first of Persons, secondly of Things or Property, and thirdly of Actions. But, of course, a short and elementary book is more easily arranged than a large work like the Digest. And after all, the simplicity of the arrangement of the Institutes is gained by the rather unfair means of dragging in the law of succession and the law of obligations under the head of Property. The scheme, however, of the Digest is quite different. It was probably based on the order of the Edict. Roughly speaking, the arrangement is—

1. Jurisdiction, parties, and bars to action.
2. Kinds of actions, and to whom they are competent; actions *in rem;* vindications; actions for damages; actions for partition, &c.
3. Actions on contracts; explanation of commercial contracts.
4. Family law; marriage; tutory.
5. Successions.
6. Judgment and execution.
7. Injunctions or interdicts; special pleas, such as *res judicata;* prescription; fraud, &c.; and bonds and sureties.

This concludes the matters of purely civil actions.

Then come—

8. Punishment of wrongs, civilly and criminally; actions for penalties; and criminal law.

9. Public law, including municipal law, and general rules as to interpretation.[1]

Section 11.—BLUHME'S THEORY.

How are the different extracts arranged in the separate titles? The order of the extracts is extremely difficult to follow. There is, however, a clue. It was discovered by a young German—Friedr. Bluhme—and published in his thesis for his degree when he was only twenty-three years old.[2] The plan seems to have been something like this: the whole of the juristic literature was divided into three great masses:—

1. Books of an elementary character, such as the *Institutes* of Gaius and special treatises on the old civil law—the *jus civile.* In this group the most important work was a voluminous treatise by Sabinus, upon which Ulpian had written a commentary. After this book, the group or mass was called by Bluhme the Sabinian Mass.

2. Works on the prætor's edict; the *jus gentium*—Edictal Mass.

3. Miscellaneous works, especially works of "casuistry," in which difficult questions of law were raised and discussed. In this group the great name was Papinian; hence the mass is called by Bluhme the Papinian Mass.

Tribonian seems to have assigned each of these masses or groups of works to a separate committee.

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[1] See the useful analysis by Mr. Roby, *Introduction to the Digest*, pp. xxxiii. *seq.*

[2] His paper was published in the *Zeitschrift für geschichtliche Rechtswissenschaft*, vol. iv. (1818), pp. 257 *seq.*

When the Commissioners met as a body, each committee had prepared a string of extracts upon the subject in hand. These were then compared. Those extracts which contained only the same law as was in some other fuller extract were struck out; and each committee was left with a shorter string of useful passages. These were then adopted by the Commissioners. If the edictal committee happened upon a particular subject to have the longest string of extracts, they were put first in the title; then came the next longest string; and then the third. It is not denied that there are many places in the Digest where this plan has not been rigidly followed. But on the whole, Bluhme's theory has won its way to such complete acceptance, that in Mommsen's great edition of the Digest you will find the extracts marked S., E. or P., according as they belong to the Sabinian, the Edictal, or the Papinian group.

Section 12.—No Commentaries.

The preparation of the Digest occupied about three years, a remarkably short time, considering the magnitude of the undertaking. Tribonian estimates that it reduced the bulk of the juristic literature to one-twentieth of what it had been. Although so many books were consulted, and so many writers cited, it turned out five well-known authors contained most of the law which the compilers thought it worth while to preserve. These were Papinian, Paul, Ulpian, Gaius and Modestine. About two-thirds of the whole Digest comes from the works of the great five. When the Digest appeared, Justinian issued a proclamation called *Tanta*, which now stands as a preface to the work. By it he declared it should be henceforth unlawful to cite the original writers. All commentaries were forbidden. Only Greek translations and *paratitla* were to be allowed. *Paratitla* were summaries of titles with references to parallel passages in other parts of the Corpus.

Napoleon had the same idea that his code ought to stop the tide of legal literature, and he exclaimed "*mon code est perdu*" when he heard of the first commentary on the Code Napoléon. If Justinian could have foreseen the libraries of huge tomes which were to be composed to explain the Digest, he would probably have regarded his compilations as a failure.

CHAPTER XXIII.

Leges Romanae Barbarorum.

Section 1.—The Gothic Kingdoms.

Before the time of Justinian, as we have seen, the Western Empire had been overthrown. Belisarius and Narses won back Italy for a few short years. But it was overrun by the Lombards only three years after Justinian's death. Gaul had fallen for ever under the power of the Teutons. The Empire had fought a stubborn rear-guard fight for centuries. As early as the third century, the seat of the provincial government had been moved from Trêves to Arles, to be farther from the hordes pressing in from the North-East. Great numbers of the barbarians served in the Roman armies. Their leaders obtained lands held by military tenure. Some of them rose to the highest positions in the Roman official hierarchy.[1] Before the fifth century, the tribes which had been brought in closest contact with the empire, had embraced Christianity. It was in the course of that century that the barbarians established permanent kingdoms within the territory of the Western Empire. The countries which now occupy Europe began at that time to have a separate existence. Those which specially concern us here are three:—

(1.) The Visigoths, or West Goths.

They established about A.D. 412 a kingdom which included nearly all Spain, and Southern France, as far

[1] See—*e.g.*, Freeman, *Historical Geography*, 87.

North as the Loire, and as far East as the Rhone. The capital was Toulouse. The North of France and Central Germany were occupied by the Franks.

(2.) The Burgundians.

Between the Alps and the Rhone, in south-east Gaul, at about the same time, the Burgundians established a kingdom. Its capital was Geneva.

(3.) The Ostrogoths or East Goths.

In 493 A.D., Theodoric, King of the East or Ostrogoths, founded a kingdom which included Italy, part of Austria, and the sea-coast along the Riviera (coast of Provence). Theodoric acknowledged nominally the suzerainty of the Emperor at Constantinople, but he was in reality an independent king. His capital was Ravenna.

Section 2.—System of Personal Laws.

These tribes had been for centuries harassing the Western Empire, and during that time they had become to some extent Romanised. When they came in this way to set up permanent seats of government, the question presented itself, what law was to prevail in these new kingdoms?

It was answered in a rather singular way. The German tribes had themselves been migrating from place to place, governed all the time each by its own tribal customs. It seemed to them natural that a Goth should be under Gothic law, or a Burgund under Burgundian law, wherever he might happen to find himself. And they were willing to apply the same principle to the Roman provincials whom they had conquered. Let the Roman keep his law, and the Goth keep his law, although they lived side by side in the same city. This was the system called that of personal laws, as opposed to territorial. A man's law did not depend on whether he lived in Gaul, but on whether he was by race a Goth or a Roman. A contemporary writer says, "*Nam*

plerumque contingit ut simul eant aut sedeant quinque homines, et nullus eorum communem legem cum altero habeat." "It often happens that of five men who chance to be sitting together, every one is under a different system of law."[1] In order to distinguish clearly the different systems which governed their different subjects, the Gothic kings found it necessary to codify them. They had codes of Roman Law drawn up to show what law governed their Roman subjects, and Gothic codes to show what were the laws of the Goths.

Section 3.—THE GOTHIC CODES.

Each of the three kingdoms had its code of Roman law. Two of them were in force only for a few years and had little influence on the development of the law. These two were:—

(1.) The *Edictum Theodorici*, published about 500 A.D. Unlike the others it applied to both the Gothic and the Roman subjects in the kingdom of the Ostrogoths. But the reason seems to be that it contained hardly any private law. The Goths in Italy were willing to adopt the public and criminal law of the Romans, but as regards the law of the family and of succession it is probable that the system of personal laws prevailed, and that the Goth was under his old Gothic customs, and the Roman under Roman law. When Justinian's generals overthrew the Ostrogothic Kingdom the Edict of Theodoric fell with it and Justinian's *Corpus* became the law of Italy (554 A.D.).

(2.) *Lex Romana Burgundiorum*, or *Papian.*

This was published apparently by Sigismund, son and successor of Gundobald, or, as some writers think, by Gundobald himself,[2] about 517 A.D. For themselves the

[1] Bp. Agobard of Lyon, cited in Brunner, *Deutsche Rechtsgeschichte*, *i.* sec. 34.

[2] See Krüger, *Quellen*, sec. 40.

Burgundians had a code, now generally called, after King Gundobald, the *loi Gombette*. It was founded partly on native customs, but borrowed much from Roman law. The Burgundian kingdom was overthrown by the Franks in 534, so that *Papian* was law only for about seventeen years.

(3.) By far the best and the most important of these Roman codes published by the Gothic kings is that of the Visigoths. It is known as *Lex Romana Visigothorum*, or, popularly, as Alaric's Breviary (abridgment). This compilation was published by the authority of Alaric II., King of the West Goths, at Aire in Gascony, in 506 A.D. In Spain the spirit and intellectual power of Rome survived the ruin of the Western Empire more than in any other part of Europe except Italy. In preparing this code for his Roman subjects, who were very numerous, Alaric had the assistance of learned Roman lawyers. Like Justinian's *Corpus* the Breviary is taken from the two sources, the *Jus* and the *Leges*. The extracts from the *Jus* consist of an epitome of the *Institutes* of Gaius cut down here to two books—Paul's *Sentences*, a few excerpts from the Gregorian and Hermogenian Codes, and a single passage from the *Responsa* of Papinian. The selections from the *Leges* include extracts from the Theodosian Code and a number of the post-Theodosian Novels. Until the modern discovery of the MSS. of Gaius our knowledge of his work was almost wholly based on the Breviary, as was also our knowledge of the Theodosian Code so far as private law is concerned.

Section 4.—Alaric's Breviary.

Alaric's Breviary was much used in Western Europe from the sixth century to the twelfth. It was, in fact, for 500 years the *Corpus Juris* of the West, as Justinian's was of the East, and from it was derived, broadly speaking, such

knowledge of the Roman law as existed in Europe before the time of the glossators. It was used for purposes of instruction and as a compendium of Roman law in the West Gothic Kingdom even after it had ceased to be of binding authority.[1] In the south of France the Breviary continued to be the highest authority until, in the twelfth century, it began to be superseded by the *Corpus* of Justinian. In the monkish schools it was used as the text-book for legal education. When the Digest of Justinian began to be known in the West, as I shall describe later, it was natural that the Breviary should give way to it. The compilers of the Breviary had discarded, because they found them too difficult, the real masterpieces of Roman jurisprudence—viz., the writings of Papinian, Ulpian and Paul. The permanent value of the Roman law lies in the excerpts from the great jurists which we possess in the Digest. The Imperial enactments, and such books of elements as the *Institutes* of Gaius or the *Sentences* of Paul, might well enough strike the unlettered Goth as wonderfully refined when compared with their own rude legal records. But as Europe became civilised Alaric's Breviary would have been found hopelessly inadequate to meet the wants of growing trade and of changed social conditions. On the other hand, the rules of contract, and much else which the Roman jurists of the classical period had worked out with so much elaboration and subtlety, were well fitted to serve as the framework upon which the modern law could be constructed.

Section 5.—*Forum Judicum.*

For themselves the West Goths retained their national customs. About a century and a-half later, Recessuinthe, a king of the Visigoths, promulgated a new code called the

[1] Krüger, Rechtsquellen, sec. 40.

Forum Judicum, which is the basis of the law of Spain. It borrowed largely from the Roman law, but modified it a good deal, under the influence of the Church. The *Forum Judicum* applied to all the subjects of the West Gothic kingdom, and the Romans were expressly forbidden to invoke their old law.[1]

[1] See Glasson, *Histoire du Droit et des Institutions de la France*, vol. ii. p. 164.

CHAPTER XXIV.

The System of Personal Laws.

Section 1.—The *Professio Juris.*

During a great part of the Middle Ages, the curious system of personal laws continued to exist in several countries of Europe. The first thing the judge had to do was to ask the defendant, "*qua lege vivis?*"[1] The defendant's answer is called by modern writers his *professio juris.* It was noted in the record "*interrogaverunt ipso comiti supradicto qua lege vivebat? Ille autem præsens stetit, et taliter dixit quod lege salica vivebat.*" It is thought by some writers that the defendant might choose for himself whether he would live under the Roman or the Gothic law.

Out of the conflicts which arose when the parties had different personal laws, were evolved many of the rules which form the beginning of the branch of law now called Private International Law. *E.g.*, the rule that the penalty was fixed by the *lex loci delicti commissi*—the rule that legitimate children follow the personal law of their father; illegitimate, that of their mother; and many others.

Section 2.—*Capitularia.*

In addition to the personal law which differed for Goth and for Roman, there were laws made by the Gothic kings —the *capitularia*, which applied to all subjects—Goths and

[1] Brunner, *Deutsche Rechtsgeschichte*, vol. i. sec. 34.

Romans alike. The position was just what it would have been in Canada, if the English at the conquest had said "We will be under our own law; let the French keep theirs. New statutes will apply to both." There were, in fact, some who advocated this plan.

The personality of laws in Europe lasted, roughly, till about the tenth century, when territorial law began to be established.

CHAPTER XXV.

The Fate of the Roman Law in the West.

Section 1.—Disappearance of the Digest.

During the dark and confused period between the second conquest of Italy by the Lombards, just after Justinian's death, and the beginning of the twelfth century, the *Corpus Juris* is almost lost to sight. The old civilisation of the empire was becoming more and more a faint tradition. The rude and turbulent tribes, out of which the modern nations of Europe were to grow, had little time or taste for learning of any kind. So far as the Roman law was studied at all, it was mainly in the mutilated fragments preserved in Alaric's Breviary.

There was an old story at one time universally believed that Justinian's *Corpus Juris* was for centuries utterly lost. It was said that a MS. of it was discovered at the sack of Amalfi in 1137, and was presented by Lothaire II. to the Pisans, who had helped him to take the town. Lothaire at the same time declared that the Roman law should be binding in his dominions. From Pisa it afterwards came by conquest to Florence. The famous Florentine MS. of the Pandects, which is by far the best in existence, does appear to have come from Pisa. It is referred to by the Glossarists as *litera Pisana*. But the rest of the story is a fable, now altogether discredited. It embodies, however, an element of truth, viz., that the *Digest* was long neglected. There were schools of law at Ravenna—the old capital of the exarchate

—and at Padua, where the Lombards had established their capital, and the Code, the Novels, and the Institutes were to some extent studied.[1] But the Digest was almost, if not entirely, ignored.

Section 2.—Irnerius at Bologna.

At the beginning of the twelfth century, there began a remarkable awakening, which has been called the Twelfth Century Renaissance. It was due largely to the rise of the Italian cities. After centuries of invasions and confused fighting, there had come a period of tranquillity, and commerce began to make a rapid advance. With the spread of trade came the desire for rules of law fitted to meet the complicated relations which now emerged. The first famous teacher of the Roman law at this time was Irnerius (*circa* 1100). He gave lectures at Bologna, to which students flocked from all parts of Europe. The school founded by him gained such celebrity that it is said to have had at one time 10,000 students—clerk and lay, boys and greybeards. Irnerius, called by his admirers *lucerna juris*,[2] was the first of the school of Romanists known as the Glossators. They were so styled because they wrote *glossæ*, or notes, upon the Roman texts. These were, primarily, explanations of hard passages, but the glossators also helped the student by inventing *casus*—*i.e.*, hypothetical cases raising the point stated theoretically in the text; and *summæ*—*i.e.*, short abstracts of the subject under consideration. Irnerius' immediate following were the "four doctors" of Bologna, whom he himself described in the lines,

Bulgarus os aureum, Martinus copia legum.
Mens legum est Hugo, Jacobus id quod ego.

[1] Muirhead, 2nd ed., 405.

[2] See Rashdall's *History of Universities of Europe in the Middle Ages* (Oxford, 1895); Fitting, *Anfänge der Rechtsschule zu Bologna* (Berlin, 1888); Flach, *Etudes Critiques sur l' histoire du droit romain* Paris 1890).

After the "four doctors" came Odofredus.

"Chi non ha Azo, non vada a Palazzo," was a popular saying. It means that in some places a lawyer could not become a judge unless he possessed a copy of the *Summa* of Azo.

Section 3.—Accursius and the Glossators.

The notes of these writers accumulated in volume. They were scattered about in many places, and were, naturally, not always in agreement with each other. Franciscus Accursius (*circa* 1260) brought them all together, analysed them, and published the whole *Corpus Juris* of Justinian with the most important notes of his predecessors, and with many notes of his own opposite the text. This great work is called the Great Gloss—*Glossa ordinaria.* The books of Justinian in this edition are not arranged as they are now. The glossators adopted a curious division, probably due to the fact that they did not become possessed of all the MSS. at the same time. They divided the whole into five volumes:—

(1.) *Digestum Vetus* (books i. to xxiv.; tit. 2).

(2.) *Infortiatum* (books xxiv., from tit. 3 to end of book xxxviii.).

(3.) *Digestum Novum* (books xxxix. to l.).

(4.) Code (first nine books only).

(5.) *Volumen parvum:* the *Institutes;* the *Authenticum* or Latin translation of 134 of the Novels; and the last three books of the Code.

In the Code they also inserted as notes abstracts of the Novels which had modified the law of the Code. These were called *Authenticæ.*

Corneille makes a gentleman say, by way of ingratiating himself with a lady:

"Je sais le Code entier avec les Authentiques,

"Le Digeste nouveau, le vieux, l'Infortiat."

This arrangement of the works of Justinian lasted after the invention of printing, and was not discontinued until the sixteenth century.

The *Infortiatum* is perhaps so called (Digest Strengthened), because it was discovered after the other parts.

Section 4.—The Great Gloss.

The gloss of Accursius was the great fountain of legal learning for centuries. It was held as of the highest possible authority—even greater than that of the text itself. Raphael, a professor at Padua, taught his students that it was better to have the gloss on one's side than to have the text. If a lawyer cited the text the judge would retort, "Do you think the great Accursius had not studied the text and that he did not understand it better than you?"

When the Roman law was accepted bodily, as in Germany, it was the glossated texts alone which the Courts paid attention to. Certain parts of the *Corpus* which the glossators had not annotated, generally because they dealt with institutions no longer existing, were likewise treated by the judges as inapplicable to modern life. "*Quicquid non agnoscit glossa nec agnoscit forum.*" This maxim does not mean that the non-glossation was the reason why the passage was not "received." It merely states the historical fact that it was the Roman Law of the glossators which was held binding.[1]

Section 5.—Characteristics of the Gloss.

It can hardly be said that the notes of the glossators which were at one time regarded with such extreme respect are much looked at nowadays. If we glance over them we

[1] See Dernburg, *Pandekten*, sixth ed., vol. i. sec. 4 (Berlin, 1900). The Institutes were all glossed: the *Digest* all except parts of two titles. Only 96 Novels were glossed. For the unglossed constitutions of the Code and the Novels see Vangerow, *Pandekten*, seventh ed., vol. i. sec. 6, Amm. 1 (Marburg, 1876).

are apt to be more struck with some absurdity of medieval thought than with any merit of the commentator. The glossators regarded the *Corpus* in much the same way as the old commentators regarded the Bible. They made no attempt to take into account the date, and the authorship of the separate parts, or the circumstances in which each was composed. The glossarists looked upon all this collection of writings, by many different hands, as if it had been a new code just published at Bologna. It was all the word of the great Justinian. The text was for them sacred. On the other hand, they had little scruple in twisting the literal words of a passage into a sense which they were never intended to bear. Obviously a good deal of this had to be done if the laws of the second century were to be made to fit the society of the twelfth. Of what we now call historical criticism they had not the faintest trace. We are startled sometimes by the depth of their ignorance. In one place Justinian is spoken of as a contemporary of Jesus Christ.[1] The habit of mind with which they regarded the texts is characteristic of their age. Just as Aristotle was treated by the Schoolmen as infallible, and his statements accepted as applicable to all circumstances, so the glossarists took no account of what to a modern would be the first thing to bear in mind—viz., that Justinian's *Corpus* had been compiled more than 500 years before their time, and was made up of extracts from works of a still earlier date. It did not strike them that this fact alone made it impossible that the Roman law should be applicable to many circumstances which arose in a society which had undergone a complete re-casting. The modern view, which looks upon the Roman law as upon the other remains of antiquity with the detachment of the critic, would have been unintelligible to the glossarists. We drop out whole chapters of the Roman law as clearly

[1] Gl. ad Nov. 47, c. 1.

belonging to a past age. The glossators thought they were bound to take the law, the whole law, and nothing but the law.

Section 6.—ILLUSTRATIONS.

I may be allowed to borrow a few examples of the absurdities of the glossarists from the work of an old writer, Berriat Saint Prix :—

"When Justinian speaks of a magistrate as having an innate love of study, this means he was studious before and after his birth." "Inanimate things, such as machines, cannot commit fault." "*Capitis deminutio* does not imply that the man's head has literally been taken off." "The *Lex Falcidia*, like a *falx* which cuts the grass, cut off a part of the legacy."

"The cuckoo is not hatched; it is born from the ground."

"Laws being made for common cases, we need none for good women, because they are so rare; only for the bad, who are many."

"Seeing that one cannot take stones from another man's quarry without paying him in advance, therefore an advocate is entitled to get his fees beforehand."[1]

Section 7.—*VERSIO VULGATA.*

But in spite of much that strikes us now as absurd, the glossators did a great and valuable service to the science of law. Their crowning merit was that they went back to the

[1] The fullest information about the glossarists is still to be found in Savigny, *Geschichte des römischen Rechts in Mittelalter* (7 Bände, second edition, 1834–1851).

There is a French translation (abridged) by Guenoux, published at Paris, 1839.

I may also refer to Rivier, *La Science du droit dans la première partie du moyen-âge* (in *Nouvelle Revue Historique du Droit Français*, vol. i. [1877]), and to Fitting, *Zur Geschichte der Rechtswissenschaft in Mittelalter* (in *Zeitschrift der Savigny-Stiftung*, vols. 6 and 7).

original texts. Before them the law was to be found partly in the crude and meagre codes of the Gothic kings, partly in custom, partly in rules laid down by the Church. Everywhere it was dark and obscure. The law of the Digest was incomparably better than the law of Europe in the Dark Ages. The glossarists went back to the great monuments of the Roman law, gathered together all the texts, explained them, and showed their connection with each other. By comparison of several MSS. they constructed the text of the whole *Corpus*, which was for centuries the authorised and received text, and is called the *versio vulgata*. Secondly, the glossarists by the most patient study showed the relation of the parts of the *Corpus* to each other. Their references to parallel passages, and their notes showing where a provision of the Digest or the Code has been modified or repealed by a Novel, are still of great utility and have been retained in modern editions of the *Corpus*. We undoubtedly owe to them the preservation of the text and the marginal references. All else of value in the Gloss has long since passed into other works where it is easier to find than in the cumbrous folios of the glossarists.

Section 8.—Bartolus and the Post-Glossators.

To the school of the glossators there succeeded the post-glossators or Bartolists, as they were called, after the most celebrated of them, Bartolus de Sassoferrato (1314–1357). As Accursius is the typical lawyer of the thirteenth so is Bartolus of the fourteenth century.

The post-glossators applied to the law the methods of the school-men who annotated Aristotle. Casuistical and fond of hair-splitting, they gradually drifted further and further away from the original texts. Their work was *glossare glossarum glossas*. They cited great numbers of opinions, and generally accepted the *opinio communis* which had the

mass of commentaries in its favour, though sometimes it had neither the Roman text nor common sense on its side. As commentaries on the Roman texts their works are of no value. Cujas said of them, in language which applies to annotators of all ages, *Verbosi in re facili; in difficili muti; in angusta diffusi.*[1] But they did a good deal in the way of adapting the Roman law to the modern world, and had considerable influence in shaping what the French call the *Droit Civil*, and the Germans the *Heutiges Römisches Recht.* In his day Bartolus enjoyed a fame and a position greater perhaps than any lawyer has gained before or since. He was called the Pilot of Jurisprudence, the Prince of Legislators, the Light of the Law, the Miracle of Nature.[2] In Spain and Portugal his writings were declared to have the force of statute, at Padua a chair was established for *lectura textus, glossæ et Bartoli.* As Mr. Flach says, much like saying, "the law and the prophets."[3] Even more curious, the Emperor Charles IV., among other high distinctions, gave to Bartolus and his descendants who should be professors of law, the right to legitimate any of their students who might be illegitimate, and to emancipate any from the disabilities of minority. The school of the Bartolists produced a vast mass of enormous tomes now hardly ever consulted. The revival of letters in the fifteenth century brought about in the sixteenth a revival in the study of the Roman law.

Section 9.—CUJAS AND DONEAU.

As Bartolus is the great name for two centuries, so Cujas is the great name of the sixteenth century. Cujas was the most eminent example of what was called the *mos gallicus*

[1] Lib. 5, Respon. Pap. ad L. 17, *de injusto rupto;* see Flach, *Cujas et les Glossateurs*, p. 16.

[2] Berriat Saint Prix, 309.

[3] *Cujas et les Glossateurs*, p. 17.

or French School of Jurisprudence, as opposed to the *mos italicus* or Italian School of the glossators and post-glossators. The Italian School, which the Germans mostly followed down to the end of the eighteenth century, was the method of gathering together the authorities *pro* and *con*. The French School aimed at going back to the pure Roman law. Cujas (1522–1590) was a learned scholar possessed of immense antiquarian knowledge. He studied with the greatest acumen the original texts of the Roman law and did much to elucidate them.

His great rival was Doneau (Hugo Donellus), (1527–1591), who singularly enough was a fellow professor of Cujas at the little University of Bourges.

Doneau was the first writer who attempted to give a synthetic view of the whole Roman law arranged as a logical system.

Section 10.—POTHIER.

I cannot attempt to review the history of the law in modern times. The greatest name in France of the eighteenth century was Pothier. Through his writings, which were greatly relied upon by the compilers of the Code Napoléon, a great deal of Roman law may be said to have been definitely received into the law of France. It is worth noting that the French law takes its Roman doctrines not directly from the Roman texts, but through the French commentaries, and especially through Pothier. Pothier was a great student of the Roman law, but he was not infallible. When he trips, as he sometimes does, in his interpretation of the texts he generally leads the Code Napoléon into the same error.[1] From this necessarily brief sketch we see that in the French law the Roman law has always been, so

[1] Girard, *Manuel*, p. 4; Pandectes Françaises, vo *Obligations*, n. 27.

to speak, the centre and nucleus of the whole. Other elements contributed to its formation, but without the Roman law it never would have assumed its present shape at all.

Portalis, after the Code Napoléon was introduced, could still say, "Une législation civile vient d'etre donnée à la France, mais n'allez pas croire que vous puissiez abandonner comme inutile tout ce qu'elle ne renferme pas. Jamais vous ne saurez le nouveau code civil si vous n'étudiez que ce code. Les philosophes et les jurisconsultes de Rome sont encore les instituteurs du genre humain. C'est, en partie, avec les riches matériaux qu'ils nous ont transmis, que nous avons élevé l'édifice de notre législation nationale. Rome avait soumis l'Europe par ses armes, elle l'a civilisée par ses lois." [1]

[1] Berriat Saint Prix, 277.

CHAPTER XXVI.

FATE OF THE *CORPUS JURIS* IN THE EAST.

Section 1.—THEOPHILUS.

THE history of the Justinianian compilations in the East is very different from that in the West. Their very merits made them from the first unsuitable as the working law-books for the Eastern Empire. It was not only that they were of great volume, and that the arrangement of them was very difficult to understand. But they were essentially Roman. They were written in the Latin language, which in the East was known only to a few scholars, and they were saturated with doctrines which were only intelligible as the outcome of Roman civilisation.

Although the emperors of the East kept up the theory that they were the Roman emperors, Constantinople became more and more Greek. The Roman law became more and more a foreign law written in a foreign tongue. Before the lawyer could be sure that he was in possession of the law upon any point, he had to wade through a number of opinions not always very consistent, as they had been roughly thrown together in the Digest, and then to make sure that the law had not been changed by any of the myriad constitutions in the Code and the Novels. In spite of Justinian's prohibition of abstracts and commentaries, such works were quickly found to be indispensable. The professors of law in the schools of Constantinople and Berytus (Beirout, in Phœnicia) were compelled for the benefit of

their students to attempt to extract the essential and practical parts of the Justinianian books, and to explain and paraphrase the passages which were ambiguous. These abstracts found their way from the class-rooms to the Courts, and led to the preparation of other summaries of parts of the law not treated of in the academic prelections. The Digest and the Code in their original form seem to have dropped almost out of use at an early period. Of the Institutes, Theophilus, probably the same who was one of the three compilers of the Latin original, prepared a Greek paraphrase, which contains a good many explanations not found in the Latin. This was intended primarily for his students at Constantinople, where Theophilus gave a course of lectures on the Institutes. But the position of its author gave it great authority, and it was widely used and circulated in the East.

Section 2.—THE *BASILIKA.*

In the ninth century there was a considerable revival of legal activity in the East. There had been by that time so many changes made by imperial laws that it was very difficult to find out what the law was upon any point. To remedy this, the emperors Basil the Macedonian, and his son Leo the philosopher, (888–911), caused to be prepared an elaborate compilation in Greek which is called the *Basilika* or royal law. In it the law of Justinian is rearranged. The whole law of each subject is gathered together from Institutes, Digest, Code, Novels, and the laws since Justinian's time. The *Basilika* consisted of 60 books. We do not possess them all in a complete form. The *Basilika* was the law of the Eastern Empire until Constantinople was taken by the Turks in 1453. It is noteworthy as showing how completely the *Corpus* of Justinian had been forgotten in the East that among the many thousand MSS.

which found their way to Europe from the libraries of Constantinople after the siege, there was none of any part of the *Corpus* of Justinian except the Novels. Learning was at a very low ebb in the tottering Eastern Empire for many centuries. The lawyers in practice disregarded the *Basilika* almost as completely as Justinian's *Corpus*. They used meagre epitomes or abstracts. One of these—the *Hexabiblos*—said to be a poor epitome of previous epitomes, which goes back to 1345, was, strange as it sounds, made the law of the restored kingdom of Greece in 1835. Since then Greece has got new codes largely based on the Code Napoléon.

CHAPTER XXVII.

THE INSTITUTES.

Section 1.—GENERAL ORDER.

THE first two titles are introductory. Title 1, which is mainly from Ulpian, gives definitions of justice and jurisprudence; declares that the Institutes are intended to give an abstract of private law; and distinguishes between *jus naturale*, *jus gentium*, and *jus civile*.

Title 2 explains in greater detail, and in the words of Gaius, the distinction between *jus civile* and *jus gentium*, and then describes shortly the sources from which the law is derived.

Section 2.—PERSONS.

With Title 3 the systematic arrangement begins. The order is taken from the Institutes of Gaius. *Omne autem jus quo utimur vel ad personas pertinet vel ad res, vel ad actiones* (I. 1, 2, 12). The whole field of law is divided into—

(1.) Persons; (2.) Things; (3.) Actions.

The division into books does not quite coincide with the system. The *jus quod ad personas pertinet* occupies Book I. from Title 3 to the end. The *jus quod ad res*, Books II., III. and IV., to end of Title 5. The rest of Book IV. is *quod ad actiones*. He treats, in fact, first of the capacities of persons as subjects of rights. The law of persons is mainly taken up with an analysis of legal capacity and its limitations. It distinguishes between capacity of right and capacity for legal disposition.[1] The right to own property does

[1] *Capacité de droit et capacité de fait* (*Rechtsfähigkeit und Handlungsfähigkeit*)

not necessarily involve the right to dispose of it. Children, lunatics, or prodigals must be protected against themselves.

The notion of a "person" in the law involves that of capacity of right. But certain men such as slaves are not persons, and a man may lose his legal personality, and with it his legal capacity.

Section 3.—THINGS.

Then he treats of things, corporeal and incorporeal. Under this head fall obligations, and succession, in addition to other rights of property. These are "things," for a man in estimating his property, would, properly, include among his assets debts due to him under any obligations, and his share in the estate of his deceased relative, or a legacy which had been left to him by a deceased friend, and was not yet paid.

Section 4.—ACTIONS.

Then come actions. How are the rights which the law sanctions to be protected? Only by forms of procedure. Therefore we must explain judicial remedies.

Section 5.—SUBJECTS, OBJECTS AND REMEDIES.

Looked at subjectively, it is also true that every right may be considered in three aspects :—

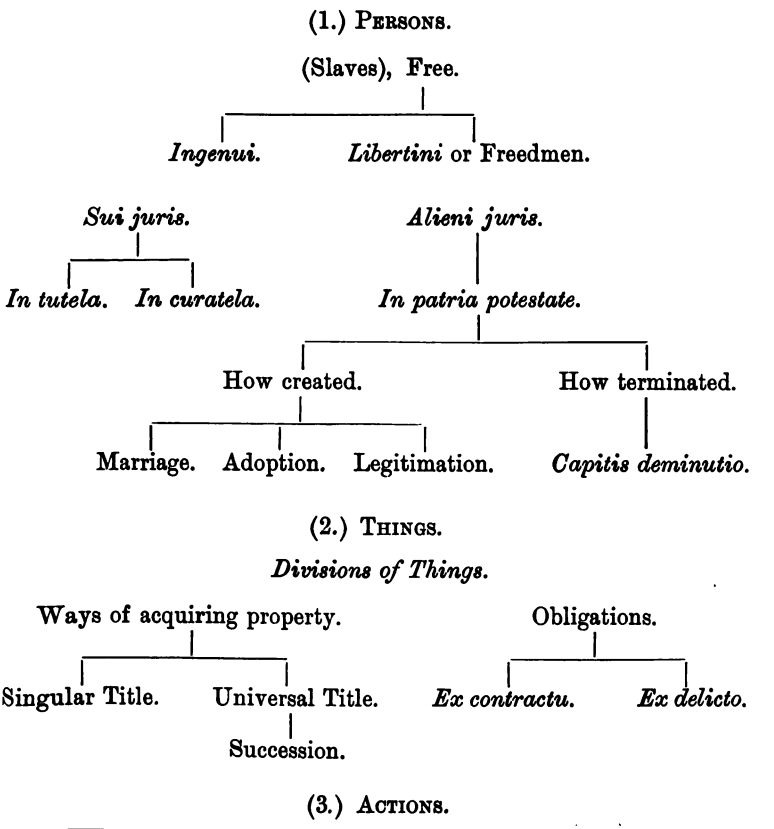
(1.) As residing in a given person who is its subject.
(2.) As existing over a given thing.
(3.) As enforceable by a given remedy.

If you have seized my book I am the subject of the right of ownership in it. The book is the object of that right. The remedy is revendication.

Perhaps, as Mr. Moyle thinks (p. 93), the arrangement was not really based on such a philosophical conception. Gaius meant simply to divide the law into Subjects, Objects, and Remedies, and not to regard each right from these three

points of view. Very likely this classification was not invented by Gaius. It may even go back to the pontifical jurisprudence of early Rome.[1] Its practical convenience is pretty well demonstrated by the fact that modern Codes, such as those of France or of Quebec, are arranged according to this scheme. But it does not seem, as some writers have supposed, that the Romans attached any peculiar sanctity to it, or else we would expect the *Digest* to be arranged upon the same plan.

The general order is—



[1] Karlowa, i. 725.

CHAPTER XXVIII.

BOOK I.—PERSONS.

Section 1.—*PERSONA.*

THE science of law has for its object to ascertain rights, and to show how these rights may be enforced. But there can be no right which does not belong to someone. A right cannot exist *in vacuo*. There must always be someone who has an interest in claiming it. This someone whose existence every right presupposes is a "person." By person (*persona*) is meant the subject of legal rights; an entity which can have property, claims, debts. Etymologically, *persona* means a mask such as was worn by actors. Hence it was used in the sense of a rôle, or part which an actor played. Just as an actor may play many parts, so an individual may have several legal *personæ*. He may—*e.g.*, be a tutor, and hold money or sue actions not for himself, but as a tutor. *Unus homo plures personas sustinere potest.* He may bring one action as an individual, and another in his quality of tutor.

Section 2.—*CAPUT.*

Complete legal capacity was called in the language of the older Roman Law by the name *caput*. In considering the various rights enjoyed by a person whose *caput* was unlimited—*i.e.*, who enjoyed the highest and fullest measure of political and civil liberty, both in the sphere of public law,

and of private law, permitted by the law, it seemed to the Romans that they might be divided into three classes :—

(1.) There were certain rights which a man enjoyed in virtue of his being a freeman. Every man who was free, whether he was a Roman or a foreigner, enjoyed these rights. Only the slave is debarred from them. These rights flow then from the *status libertatis*. *E.g.*, even a foreigner can make a contract, which the prætor will consider binding under the *jus gentium*, though he cannot make a contract according to the *jus civile*.

(2.) In addition to his rights as a freeman, the Roman has certain rights as being a Roman citizen. From these rights the peregrin is excluded. They flow from the *status civitatis*. He can make a contract in the form of the *jus civile*, can contract *justæ nuptiæ*, &c.

(3.) In addition to his rights as a freeman, and his rights as a citizen, a Roman who was the head of his family, who was a *paterfamilias*, has certain rights in that character. He can acquire and dispose of property by himself, without reference to any other person. From these rights a *filius-familias* is debarred, although he is both a freeman and a *civis*. They flow from the *status familiæ*.

They divided "*caput*," therefore, into these three elements : *libertas*, *civitas*, *familia*. All three are required for complete legal capacity. The loss of any one of them is a loss of status—a *capitis deminutio*—though of course it is more serious to become a slave than to become a *filius-familias*.

Slaves have no *caput*. They are not persons, but things. But it is necessary to treat of their position, because freemen may become slaves, and slaves may become freemen. And there are certain peculiarities in the position of freed-men which need to be noticed.

The status *civitas* is merely glanced at, because before the time of Justinian the peregrins or "uitlanders" had been admitted to a complete equality in respect of private rights, and all free residents within the wide bounds of the Empire had become *cives*, by Caracalla's famous law three centuries earlier than Justinian.

Many distinctions of capacity, based on want of full and complete citizenship, had become obsolete. Gaius—*e.g.*, has quite a body of law about Junian Latins and *dediticii*, which Justinian can afford to leave out.

Section 3.—*Sui Juris* and *Alieni Juris.*

Most of Book I. is really occupied with the "*Status Familiæ.*" In the family persons are either—(1) *sui juris*, or (2) *alieni juris*. Excluding slaves, whose condition has been already dealt with, the only persons who are *alieni juris* are those who are *in patria potestate*. Here again there is a great simplification in the law. In earlier times the *filius-familias* was far from being the only person who was *alieni juris*. There was the great class of married women who were also *alieni juris*, being said to be *in manu* (*i.e.*, in the power) of their husbands. And there was the less important but curious class of persons who were said to be *in mancipio* —*i.e.*, free persons who had been lawfully sold into bondage, and were for a longer or shorter period very much in the position of slaves, and yet differed from slaves. They were more like living pledges, for if they paid the sum for which they were in pawn, they could claim their freedom.[1] These classes are both spoken of by Gaius, though even in his day, some 400 years before Justinian, *manus* and *mancipium* belong rather to the antiquities of the law than to practice. *Manus* was altogether obsolete before Justinian, and he abolished the last vestige of *mancipium* by declaring that if

[1] I. 4, 8, 3.

a father were sued for damages for a delict of his son or daughter, he should not be entitled to escape payment by surrendering his child to the plaintiff.[1]

So that by the law of Justinian when we say any one is *alieni juris*, we mean that he is in *patria potestate*. This introduces an account of the three ways in which *patria potestas* originates. These are—(1.) Marriage; for the husband is the *paterfamilias* of the children of the marriage. (2.) Adoption; for this means to bring the child of another into the place of a natural child. (3.) Legitimation; by which an illegitimate child is raised to the status of legitimacy.

Section 4.—*Capitis Deminutio* and Tutory.

Then come the ways in which *patria potestas* may be dissolved. Most of these may be grouped together under the head *capitis deminutio*, a term roughly analogous to "civil death." Again, persons *sui juris* may be—(1) in tutory, or (2) in curatory. The various forms of *tutela* or guardianship are described; how tutors are appointed; and what are the nature and limitations of their functions. Then comes curatory—*curatela*—and it is shown what classes of persons may be in *curatela*. These are the deaf and dumb, minors, lunatics, and others who from mental or bodily infirmity cannot manage their own affairs, and interdicted spendthrifts. Then it is explained when tutors and curators have to find security, and of what nature the security has to be. It is noted that the office of a tutor or curator is *publici juris*—*i.e.*, it is a public duty to accept it. It cannot be declined, except for certain good reasons which are enumerated. Lastly, it is explained upon what grounds a tutor or curator may be removed from his office.

[1] I. 4, 8, 7. In practice such surrenders had long been obsolete. *Ib.*

CHAPTER XXIX.

The Maxims of the Law.

Section 1.—Ulpian's Definitions.

The Institutes, like most modern compendia of law, begins with a preliminary attempt to explain the nature of law and of jurisprudence. The compilers did not find anything of this kind in Gaius, so they borrowed three passages from Ulpian's Rules which struck them as suitable,

(1.) *Justitia est constans et perpetua voluntas jus suum cuique tribuens.*

This was a traditional definition. We find it in Plato's "Republic" (I.) cited from Simonides, "*τά οφειλόμενα ἑκάστῳ αποδιδόναι δίκαιόν ἐστι.*" Cicero has a similar definition: *animi affectio suum cuique tribuens.*[1]

(2.) *Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*

(3.) *Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*

Section 2.—*Jus* and *Fas.*

These general precepts and definitions are obviously unsatisfactory. They do not distinguish sharply between the sphere of law and the sphere of morals. They were probably retained by the compilers of the Institutes merely for the sake of old association. All primitive peoples mix up law

[1] *De Fin.* v. 23.

and religion, and in early times the priest is at the same time the lawyer, as the pontiffs were at Rome. But the Romans perceived earlier than most peoples that the field of law was not co-extensive with that of morals. They distinguish very early between *Fas* and *Jus*.

Fas = the sum of the duties owed by man to the gods.

Jus = the sum of the duties owed by man to man.

It is true that for a long time the pontiffs were the interpreters of both *jus* and *fas*.

These old and familiar *præcepta juris* did not lead the lawyers astray. We find the jurist Paul—*e.g.*, expressly declaring, "*Non omne quod licet honestum est.*"[1]

Section 3.—JUSTICE.

Consider for a moment the three definitions. Justice is a steady and fixed intention, &c. It is not enough to make a man just that he should occasionally do just acts. He must have a just character; a fixed habit of justice. This is according to the Aristotelian philosophy. Every virtue must be a fixed or ingrained habit (ἕξις προαιρετική) = a habit or trained faculty of choice (Nic. Eth. 2, 6, 15), which manifests itself in virtuous acts as a good tree brings forth good fruit. But, clearly, the law cannot enforce justice in this sense. It may insist on the *jus suum cuique tribuens*, if by *jus suum* we understand a man's legal rights. The law will see that a man gets his legal rights. But it will not pretend to see that his debtor pays him with a *constans et perpetua voluntas*. Even a grudging and enforced performance will satisfy the law's demands.

Section 4.—JURISPRUDENCE.

So with the second definition. One would think that everything conceivable must belong either to the sphere of

[1] D. 50, 17, 144.

the divine or the sphere of the human. If so, jurisprudence would be, according to the definition, the science of the universe.

Probably Ulpian does not mean to say this, though it is true that the Romans looked upon law as the most necessary of all sciences; calling it, sometimes, *scientia civilis*, or *sapientia civilis*. But here Ulpian seems to be referring in a somewhat flowery and rhetorical manner, to the distinction between *fas* and *jus*, and declaring that jurisprudence includes both.[1]

It is worth noting that jurisprudence is a term which is used by English and French writers in different senses. In the English sense jurisprudence means the science of law, as *jurisprudentia* meant in Latin; though as we have seen *jus* was sometimes understood by Roman writers very broadly. If we restrict "law" to its modern meaning, then by jurisprudence, or the science of law, we mean the investigation of one or more legal systems in order to discover the fundamental principles. Just as the geologist or the astronomer takes a great number of facts and tries to co-ordinate them, and to show their relation with each other, so the scientific lawyer collects and observes a number of laws—either statutes or customs—and tries to find out what common principles underlie them. Professor Holland defines jurisprudence as "a scheme of the purposes, methods, and ideas, common to every system of law." This is rather a definition of comparative jurisprudence than of jurisprudence pure and simple. In discovering what principles are primary or fundamental, it is often a great help to compare several legal systems. If the same rule runs through them all, it will incline one to think that this is an "idea common to every system of law." But Mr. Holland would probably admit that even if there were only one legal system in the

[1] Accarias, *Précis*, 5.

world, we might still speak of jurisprudence in the sense of a scientific attempt to explain and correlate the elementary principles upon which that system was based.

In French legal language "*jurisprudence*" is not used in its original sense of the science of law. It means the construction which the Courts are in the habit of giving to a particular law, what English lawyers mean by the "current of judicial decisions." We say in this sense the jurisprudence of the Court of Appeals at Quebec differs upon a certain point from that of the Court at Montreal. In a still looser way, "*jurisprudence*" is used to mean merely the cases which have arisen under a certain provision. It is used in opposition to *la doctrine*, that is, the teaching of the commentators.

E.g., the list of cases which have been determined as to the sense of a particular article of the Code is called the "*jurisprudence*" upon that article, and is contrasted with the "*doctrine*"—*i.e.*, the views of the accepted writers of commentaries. I might be permitted to illustrate this use of the word jurisprudence by a story told of a well-known Judge—Sir Francis Johnson, C.J. A counsel pleading before him had argued that as there were two decisions in his favour, and absolutely none against him, the Court was bound to decide for him. The Chief-Justice gave judgment in these terms: "Vous vous plaignez qu'il n'y ait pas de jurisprudence dans le sens contraire. Je vous en donnerai. Action déboutée."

This meaning of jurisprudence as merely the decided cases is quite incorrect, but is pretty well established.

Section 5.—Law *versus* Morals.

Ulpian's definitions did not really deceive the Roman lawyers. They saw that law and morals were two things. Morality generally includes law, because most laws enjoin the performance of duties which are at the same time moral

duties and legal duties. The law which compels a man to pay a debt for which he has given a promissory-note, compels him to do what it is also his moral duty to do. Still it is easy to suppose a law which should enjoin the doing of a wrong thing—*e.g.*, ordering the massacre of some innocent persons who happened to belong to some sect or class not in favour with the Government. It would still be a law, but an unrighteous law. In such a case there would be a conflict between law and morals. It might be the moral duty of the good citizen to disobey the law. Rebellion might be more righteous than helping in cold-blooded murder. So with decisions of judges. They may settle the law, but settle it in an unjust sense. As the jurist Paul says: "*Prætor quoque jus reddere dicitur, etiam cum inique decernit*" (D. 1, 2, 11). Most laws, happily, command right things, not wrong things to be done. But they do not command all right things, but only certain ones. *E.g.*, morals would require that a man paid his debt, though the creditor might not be able to prove his claim. But law says, "unless such and such evidence is produced, the debt will not be held to exist." *E.g.*, I borrow £100 from A on the simple security of my word of honour. A dies, leaving his only son as his heir. The son (*a*) knows nothing about the transaction, or (*b*) has no evidence to prove it. I have no legal duty to pay him the £100, but I have a clear moral duty to do so. A man is compelled under severe penalties to fulfil his legal duties. But he cannot be compelled to fulfil all his moral duties. And morals require that I shall perform my duties willingly, and not under compulsion. There must be a conformity between the will and the act. I must not only do the right thing, but I must do it from the right motive. A moral act can only proceed from a moral motive. But an act may be legal though done from a bad motive, and may be illegal though done from the best motives in the world.

Section 6.—MOTIVES IN THE LAW.

It is true that there are some branches of the law in which the character of an act is determined greatly by the motive with which it was done. This is so as to crimes. *Actus non facit reum nisi mens sit rea.*[1] If I strike a man with a stick, intending to kill him, and cause his death I am guilty of murder. If I strike him a comparatively slight blow, never imagining that I am likely to cause him serious injury, and he is killed I am guilty of manslaughter. If I am striking at a rat and, without any carelessness of mine, hit the man instead, this is excusable homicide by misadventure. The *mens rea* makes all the difference.

But in civil matters the legality or illegality of an act does not turn at all upon the motive with which it was done. If I invade the civil rights of another person, I commit a legal wrong, and incur liability to make reparation for any loss which may be the natural consequence of my act. The excellence of my motive will not excuse me, though it may be a good moral justification. *E.g.*, I discover that my daughter, who is of age, is on the eve of eloping with a man of disreputable character. I lock her up in her room, and succeed in preventing the marriage. The goodness of my motive does not make my act legal. My daughter can get a writ of Habeas Corpus, and no doubt would have an action against me for damages.

Conversely, I do an act in itself legal, but I do it from a bad motive, and with the intention of injuring my neighbour. Will the badness of my motive make illegal the act which would otherwise be legal? According to the Roman law it might do so. Where it was possible to show that a man's act was done solely from a desire to injure another, this was sufficient to make unlawful what otherwise would have been

[1] There is a valuable discussion as to the extent and application of this maxim in *Reg.* v. *Tolson*, 23 Q.B.D. 168.

lawful. *E.g.*, if I can show that my neighbour is sinking a shaft not for his own advantage, but merely to cut off the water which would otherwise flow down to me, or is building a screen just on purpose to block my view, I can get him restrained. Ulpian says, *Denique Marcellus scribit, cum eo, qui in suo fundo fodiens vicini fontem averterit, nihil posse agi. Nec de dolo actio est; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit* (D. 39, 3, 1, 12).

An act is unlawful if it is done *animo vicino nocendi. Malitiis non indulgendum est.*

Section 7.—German and French Law.

The German law has retained this doctrine. The new German code declares that "the exercise of a right is not permissible when its only possible object is to cause damage to another" (Art. 226). So a wall built merely to block a neighbour's view — a *neidbau*, to use the convenient German term, is not a lawful exercise of property. Obviously such a rule can only be safely applied with great caution. Proof of motive is always difficult. In many cases the erection of the wall or other act complained of might do a great injury to a neighbour. But if the owner showed that it was for his advantage, even ever so slightly, he would be within his legal rights.[1] The French law seems to be the same, though it does not rest upon any provision of the code.[2]

Section 8.—English Law.

But the English law has recently rejected this doctrine. *E.g.*, in order to prevent the subterranean water from per-

[1] See Dernburg, *Pandekten*, sec. 41.

[2] See Baudry-Lacantinerie et Chauveau *Des Biens, Traité de Droit Civil*, vol. v. no. 222; Laurent, *Principes de Droit Civil*, vol. vi. no. 140, and the following cases—Cass, 1er Juin, 1881, Dalloz, 83, 1, 332, and Lyon, 18 Août, 1856, Dalloz, 56, 2, 199. *Contra* Demolombe, vol. xii. no. 648.

colating down into my neighbour's land I sink artesian wells in my own. My sole object may be to injure my neighbour, but still as I have a right to sink the wells, the law will not restrain me because I am using my legal right from a bad motive.[1]

From a desire to injure my fellow-employee I tell my employer that I will not stay with him unless he discharges the other. My master discharges him. He has no action against me, for I was legally entitled to leave my employment, and the law will not inquire into my motives. The only question to which the law requires an answer is, "Was the act complained of a lawful or an unlawful act, quite apart from the motive with which it was done?" This subject is elaborately discussed by the House of Lords in the recent case of *Allen* v. *Flood* (1898), App. Cas. 1. "The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due." [2]

Section 9.—Law and Morals.

It is indeed a striking fact, in spite of Ulpian's vague and misleading definitions, that one of the distinctive features of the Roman law is the sharp line drawn between law and morality.[3]

The Greeks, with all their genius for art and philosophy, never arrived at any satisfactory demarcation between these two spheres. With them almost every question was left to be decided by the verdict of a large jury, which arrived at its decision upon what seemed to them to be grounds of general equity. They were continually led away by appeals to passion and prejudice.

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[1] *Bradford Corporation* v. *Pickles* (1895), Appeal Cases, 587.

[2] *Per* Lord Watson, *ibid.*, at p. 92.

[3] This is well treated by Gide in his work, *Sur la Condition Privée de la Femme*, p. 91.

At Rome, especially in the early days, the field of law was remarkably narrow, but it was well defined. The procedure was highly technical, and the judge was bound to decide according to the strict letter of the law. The law was a precise and special science. On the other hand its field was limited. A great deal was left outside the law. Much was trusted to good faith. Public opinion and a high sense of honour led the primitive Romans to deal honestly by each other. Polybius says, "If you have to trust a single talent to the care of others in Greece you will need ten written documents, ten seals, twenty witnesses, and after all you will be cheated; at Rome you will have no security but the word of the depositary, and it will be religiously kept."

Section 10.—Morals Wider than Law.

Within the family the Roman *paterfamilias* was absolute. The law does not interfere with him. The lives and property of his wife and children were at his mercy. And yet the reciprocal duties of husband and wife, parent and child, were never more scrupulously performed than when they were left to the mere discretion of the *paterfamilias*, and removed outside the range of the law. And it would be very erroneous to imagine that a society is likely to be more healthy in which the law attempts to make men act up to all their moral duties. When we find many laws which aim at making men moral, it is generally a sign that the social system has become corrupt. In the later Roman law the husband and the wife, the son and the father, are bound by heavy penalties to perform their duty to each other. It is because morals are in a state of decay that law tries to take their place. As M. Gide pointedly puts it, "Le législateur n'a commencé a y faire de la morale que lorsqu'il n'y avait plus de mœurs." [1]

[1] *Condition Privée de la Femme*, p. 127.

Section 11.—Law May Permit Wrong.

It must be remembered that though the sphere of law is narrower than the sphere of morals, there being many moral duties which the law does not enforce, yet on the other hand, the law may permit a man to do something which is forbidden by morality. Shylock says—

> "The pound of flesh, which I demand of him,
> Is dearly bought, 'tis mine, and I will have it.
> If you deny me, fye upon your law!
> There is no force in the decrees of Venice."

A man is not always morally justified in standing on his legal rights. *E.g.*, my widowed sister, who is a tenant of mine, cannot pay her rent. The law allows me to seize her furniture and turn her into the street. But such an act, though legal, would, assuredly, not be moral. *Non omne quod licet honestum est.*

Section 12.—*Jus* and *Justus*.

It is worth noticing that the terms *jus* and *justus* are used in various senses, which need to be carefully distinguished. When Ulpian says jurisprudence is *justi atque injusti scientia*, he merely means the knowledge of right and wrong. The same definition is twice applied by Cicero to *sapientia*. But by the classical jurists *justus* is generally used in a more technical sense. It denotes that which satisfies the requirements of the strict civil law. *E.g.*, *justæ nuptiæ* means more than legal marriage. It means a Roman marriage between persons having *conubium*—a marriage which has certain consequences which do not flow from every legal marriage. By the old law it brought the wife into *manus*, and the children into *potestas*. In Justinian's time *manus* was obsolete, but *potestas* survived. The marriage of a Roman with a provincial was quite legal.

But these consequences did not flow from it. It was a good marriage, but not a Roman marriage.[1]

So *injustum dominium* = property acquired without all the forms necessary to quiritary ownership. *Injusta manumissio* = any way of freeing a slave except one of the three *legitimæ manumissiones*. It did not mean illegal, for the slave manumitted in one of these less regular ways was nevertheless protected in his freedom.

Jus, again, is a most ambiguous word. It includes two ideas—viz. (1), *jus*—the *norma agendi* = law, in the sense of the law which directs and regulates. *Jus* is here used objectively. (2) *Jus*, the *facultas agendi* = right, the right which is sanctioned and protected by the law. *Jus* is here used subjectively. An example of—(1) is *jus gentium;* of (2) *jus in re aliena.*

Section 13.—Law and Right.

There is the same ambiguity in the French droit, the Italian diritto, the German Recht: cp. le droit civil, mes droits, droit réel. All these mean both law and right. English has the advantage of two words. It is the *law* which gives and protects a man's *rights*. Droit, and recht are metaphors from geometry, to be compared with "right" line; "tort," which is a crooked line; "règle," by which such a line is drawn. But *jus* is from *jubeo*, and means something *jussum—i.e.*, a law laid down by authority. Besides this broad division between *jus* in the sense of law and *jus* in the sense of right, the term *jus* is also used with various other meanings. It may mean, for example—

(1.) *The* law; as *jus civile; studiosus juris.*
(2.) A law; as *jura condere* = to pass laws.
(3.) *Potestas;* as *sui juris.*

[1] Moyle, p. 129.

(4.) Legal position in general—*i.e.*, status, as when it is said that an adopted son who is emancipated by his adoptive father returns to his *pristinum jus*—*i.e.*, recovers his original status.

(5.) The place where the prætor sat to administer justice —*e.g.*, *jus dicitur locus in quo jus redditur*. This is a very common and technical sense of *jus*. *E.g.*, *in jus vocare*, as distinguished from *judicium*, the proceedings before the *judex*.[1]

Section 14.—Definition of Law.

Although English has the good fortune to possess the word "right," which serves to express *jus* in its subjective meanings, yet still the word "law" is difficult and ambiguous. Among the many definitions which have been attempted, I think one of the best is this, which I owe to the late Professor Muirhead, of Edinburgh. "The law of any country is the aggregate body of rules which the Courts of that country will enforce for limiting, in the interest of the whole number, the freedom of action of the individual; for guaranteeing freedom of action within these limits; and for restraining it beyond them."

A man's legal Rights=the measure of the free-will which the law allows him, together with his title to have that free-will recognised and protected.

A man's legal Duties=the measure of the respect which one man is obliged to show to the rights of others.

[1] See D. i. 1, 11 and 12, where one or two other meanings are also given.

CHAPTER XXX.

Jus Publicum and *Jus Privatum.*

Section 1.—Public and Private Law.

After laying down the general maxims which I have just discussed, Justinian says that there are two branches of the law—viz., public law and private law.

Huius studii duæ sunt positiones, publicum, et privatum.

Publicum jus est, quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem pertinet.

Positiones literally means points of view. We may look at the law from the point of view of the State, or from that of the individual. This is one of those convenient distinctions which the Roman lawyers made, and every modern system has retained. It does not mean that there is an absolute division between the two branches, so that in private law the state has no interest, or that public law has no concern with the advantage of the citizen. It merely means that for purposes of convenience we may keep apart those branches of law in which our attention is mainly directed to the state, from those branches in which our attention is mainly fixed on the individual.[1] The public interest often exists in matters which at the first blush strike one as purely of private concern. *E.g.*, if a man steals my watch or breaks my head, it might seem that this was my private affair, as I am the sufferer. But really it concerns the state to see that

[1] See Markby, Elements of Law, sec. 292.

thieves are repressed, and that harmless citizens escape violence. Similarly, though as a general rule the state allows its subjects to make any bargains among themselves, which they think desirable, there are limits to this freedom of contract. Certain persons such as minors and married women are to some extent protected against themselves. And even persons of unlimited capacity are not allowed to make a contract which is against public order and good morals. It concerns the state to discourage such dealings, even though primarily they would seem to affect only the parties themselves. Papinian puts it shortly and well, *jus publicum privatorum arbitrio mutari non potest.* There is no description in the Institutes of what subjects fall under public law. In the Digest, 1, 1, 1, 2, it is said *publicum jus in sacris, in sacerdotibus, in magistratibus consistit.* This is not a very complete account either.

Public law, generally speaking, is the law which regulates the relations between the state and the subject.

Private law regulates the relations between subject and subject.

Section 2.—PUBLIC LAW.

Public law will, therefore, include :—

(1.) Constitutional Law.

All the laws which determine by what organs the sovereign authority in the state is to be exercised. Such are the laws relating to the election of members of legislative bodies, the laws defining the powers of these bodies, the laws fixing the authority of government officials, and so on.

Modern classifiers would add administrative law as a separate branch of constitutional law. Under this would fall all laws dealing with the privileges and duties of public officials, laws as to collection of revenue, poor-law, education,

recruiting for army and navy, &c., &c.[1] The Roman law included all such law under the general head of constitutional law. In a general way it referred to *magistratus.*

(2.) The *Jus Sacrum.*

The rules which the state lays down as to the ceremonies of an established Church, its right to tithes, &c., the privileges of its priests, &c. At Rome in the early days, the pontiffs were the lawyers, and in the latest times the organisation of the Church was regarded as a very important part of the work of the state, as we see from the large number of constitutions in the Code and Novels which deal with ecclesiastical law.

(3.) Criminal Law.

Crimes which the state feels it ought to punish, are to be distinguished from delicts or torts which concern the injured individual, and not the state. The state will not punish a man for carelessly running over me and breaking my leg. It leaves me to bring an action of damages. And in early laws the field of delict is much wider, and the field of crime much narrower than in later times.

Section 3.—Laws of Public Order.

In addition to these sub-divisions of public law, comes the application of that term to many laws which belong to the field of private law.

There are many laws which belong in one sense to public law, and in another to private law. These are "the laws of public order and good morals." They are laws which affect only the relations of subjects *inter se*, and would therefore appear to fall under private law. But the private rights which they affect are so important that the state feels bound to protect them. To allow shameless dishonesty or gross

[1] Holland, Jurisprudence, p. 331.

immorality to go unreproved would harm the state. It is in this sense that Papinian uses *jus publicum*, when he says, *jus publicum privatorum arbitrio mutari non potest.*

Contrary to the general rule that parties may make any agreements they please, and the state will enforce them—*pacta dant legem contractui*—there are some agreements which the state will refuse to enforce, because they conflict with the principles of good morals and public order. *E.g.*, to take a few examples from the Roman law.

The law would not allow a man by any agreement to deprive himself of the right of making a will in any terms which he chose. He could not tie his hands beforehand. A promise that he would leave all his property or any part of it to a particular person would not bind him. The law would not enforce it, because it was a matter of public policy that people should be free to make their testamentary provisions as they chose when they came to die. If they wanted to make donations during their lifetime, they must make them out and out. There was one reasonable exception to this. A promise made in a contract of marriage is not like an ordinary donation. On the faith that it will be fulfilled, the man and the woman take a step which is irrevocable. It is right, therefore, that the law should enforce donations made in contracts of marriage, even though they are not to take effect until after the donor's death. Public policy demands that testaments shall be revocable *ad nutum.* There is no rule more firmly fixed in the law. A testament is essentially revocable, or ambulatory, as English lawyers call it. And a donation of something to be paid after the donor's death is, so far as it goes, a testament, and, like a testament, it may be revoked. But a donation made in a marriage-contract is different, for there the donee has given a *quid pro quo* by entering into the marriage.[1]

[1] See Esmein. *Mélanges*, p. 59, Cp. D. 39, 6, 13, 1, 35, 4. Labbé *sur* Ortolan, liv. ii., app. iv. vol. i. p. 733.

Again, it was for a long time a rule of public policy at Rome that an heir instituted by a will should be an heir in reality as well as in name. He must get a substantial share of the estate. The testator could not appoint A B his heir and then leave his whole estate to legatees. A B was entitled by the *Lex Falcidia* to one-fourth of the estate, by the mere fact of his being instituted as heir. Justinian, as we shall see later, came to the conclusion that public policy did not require to go so far. He provided that if the testator did not expressly declare otherwise, the heir was to get his quarter. But if the testator declared in so many words that he wished the heir to take less than a fourth, or even to take nothing at all, but to give the whole estate to the legatees, this was not, in Justinian's view, so contrary to public policy that effect ought to be denied to it.[1]

So also it was the rule of public policy that a woman should not be a party to obligations of suretyship. If a creditor accepted a woman as a surety, he did so at his own risk. She could not be compelled to fulfil her obligation. She could shelter herself behind the defence or *exceptio*, called the *exceptio senatusconsulti Velleiani*. Not married women only, but women in general were thus protected from entering into obligations of this kind for the benefit of their male friends, or of each other.

Again, a vendor, who was not very sure about his title to the property he was selling, might declare that he was not to be liable in damages if the buyer should be evicted by the real owner. The buyer might say, "I will not hold you responsible for the title. I will take my chance." Public policy did not forbid such a bargain. But the law would not allow a vendor, or, indeed, anyone else, to stipulate that he was not to be held responsible for his own fraud.

Again, a person appointed to act as a tutor could not,

[1] Nov. 1, 2, 2.

arbitrarily, refuse to act. Tutorship was a *munus publicum*, and the tutor appointed must act unless he had some legal excuse.

Section 4.—PUBLIC POLICY.

Each country has its own views as to what contracts are against public policy, and these views are liable to change. *E.g.*, public policy as understood by us does not protect a woman, as such, from her own folly or over-kindness in becoming a surety, any more than it protects her against other acts of administration which involve her in loss. If she is a widow, or unmarried, she can play ducks and drakes with her fortune as freely as a man can. If she is married, it is true that she is to a great extent protected. But the incapacity of married women has a different history, and depends upon different principles.

For a long time the Velleian *senatus-consultum* was followed in France, both in the north and in the south. Public policy seemed as clearly in its favour there as at Rome. But after much division of opinion, lawyers came round to the view that if a woman in contracting an obligation as a surety renounced the benefit of the Velleian, the renunciation should receive effect. This clause of renunciation naturally became a clause of style in dealing with women-sureties,[1] and finally the Code Napoléon abolished the last vestiges of the Velleian. The view of public policy had completely changed.[2]

Again, in all systems of law, the institutions of the family are protected from modifications made by private parties which would be contrary to the views held by the community as to the respective duties of the consorts to each other and

[1] See an article, *Des Renonciations au Moyen-Age*, by M. Ed. Meynial in Nouv. Rev. Hist., 1900, p. 108. See Viollet, *Histoire du Droit Civil Français*, 2nd ed., pp. 798 *seq.*

[2] Gide, *Condition Privée de la Femme*, 405, 414. C.N. 1123.

to their children. A man and a woman could not, for example, agree that they would be married, but that the marriage should be terminable at the expiration of ten years. They could not agree that the husband should follow the wife's domicile, or that the children should not have any rights of succession.

These are a few illustrations out of many of public law in the sense of public policy.

Public law, in the widest sense of the term, includes, therefore, all those provisions of law which relate to the citizen in his citizen-capacity. As a citizen he has certain political rights. As a citizen he has certain duties to an established church, in countries where one particular form of religion is specially recognised by the state. As a citizen he must respect the laws which the state has laid down for repressing crime. And, as a citizen also, he must in his dealings with his fellow-citizens refrain from contracts which by the law of his state are regarded as immoral or injurious. At anyrate the Courts will not lend the public authority to enforce contracts of such a character.

Public law, in a word, has to do with the rights and duties of citizens. In private law it is not the citizen as a citizen, but the individual as an individual who is the subject of the right. In the very last title of the Institutes (Book iv. 18), there is a brief outline of the laws relating to the trial and punishment of criminals. But, otherwise, the Institutes do not deal with public law except incidentally. Their field is the field of private law.

CHAPTER XXXI.

The Tripartite Origin of Private Law.

Section 1.—Three Sources of Private Law.

Every rule of private law is derived, according to Justinian, from one or other of three sources; *ex naturalibus præceptis, aut gentium, aut civilibus*—*i.e.*, either from natural law, or from the law of nations, or from the *jus civile*, the special law of Rome.

The *Jus Naturale*.

The rules of law which are derived from the precepts of nature form, when looked at in the mass, the law of nature, the *jus naturale*. This law, Justinian says, following Ulpian, extends to the lower animals. *Jus naturale est quod natura omnia animalia docuit.* Even the fishes of the sea and the birds of the air follow these precepts which nature has planted in the breast of every living thing. As examples he gives the union of the sexes in marriage, and the rearing and training of the young. No doubt some of the higher animals, and many birds, live in pairs, and are examples of conjugal fidelity and of parental care. But other animals set but a low standard of decorum, and by no means all of them show any care for their young, but leave them to take care of themselves at an age when they are sadly unable to protect themselves against their many enemies. Among fishes, for instance, it would not be easy to find much

of that training of the young, *liberorum educatio*, which Ulpian says is a universal law of nature.[1] What Ulpian means is pretty much what we mean when we say that a man who is cruel to his wife or child is worse than a beast. Even the brutes, though hardly *omnia animalia*, defend their consorts and watch over their young.

But it seems curious to say that this is in virtue of any law.

Section 2.—*Jus Naturale.*

As a matter of fact, the expression *jus naturale*, like its modern equivalent, the law of nature, is a very vague one. It is hardly ever used by two writers in the same sense. Ulpian uses it here as meaning the elementary instincts which lead men, and even some animals to form families and to restrain their natural ferocity in dealing with other members of the family. In another passage of the Institutes *jus naturale* is expressly identified with the *jus gentium jure naturali, quod, sicut diximus appellatur jus gentium.*[2] Here Gaius is speaking, and Justinian cites his words without noticing that they are inconsistent with Ulpian's. And, to add to the confusion, in other passages the *jus naturale* and the *jus gentium* which Gaius says are identical are found contrasted with each other. Thus in this second title it is said that whereas by the law of nature all men were born free, by the law of nations slavery has come in.[3] And whereas nature meant peace to reign over the earth, the law of nations has brought in wars and leadings into captivity. It is in these and similar passages that the term "natural law" is used in its ordinary sense. Neither Ulpian, who says the *jus naturale* extends to *omnia animalia*, nor Gaius,

[1] For an interesting account of the degree of parental care exercised by *omnia animalia*, see Westermarck, *History of Human Marriage*, second edition, pp. 9, *seq.*

[2] I. 2, 1, 11.

[3] I. 1, 2, 2, *cf.* i. 1, 5, pr.

who says it is the same thing as the *jus gentium*, is upon this point quite in accord with most of the jurists. Theophilus, one of the compilers of the Institutes, says in his Greek paraphrase that it is a mistake to confound the *jus naturale* with the *jus gentium*.[1] What the jurists generally mean by *jus naturale* is not any law which actually exists as a positive enactment or custom. It is a philosophical conception, borrowed from the Stoics, of an ideal justice with which positive law ought, so far as possible, to be brought into harmony. When the writer or the judge declared that the law of nature was in favour of a particular determination, what he meant was that this determination struck him as equitable and right. So Paul says, *Id quod semper æquum ac bonum est, jus dicitur, ut est jus naturale.* It is, in fact, the same thing as what English lawyers call equity, when they use that term in its general sense, and not as meaning a definite set of rules.

Section 3.—CONTINUED.

Cicero, following the Stoics, speaks of *jus naturale* as an eternal and immutable law which it is sinful for the legislator to attempt to change. *Est quidem vera lex recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna-huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est querendus explanator aut interpres eius alius, nec erit alia lex Romæ alia Athenis, alia nunc alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit unusque erit communis quasi magister et imperator omnium deus.*[2] But Ulpian does not dispute that a positive law may conflict with the law of nature.[3] *E.g.*, natural law

[1] I. 1, 2, 2.

[2] De Repub. 3, 22, 33, and see other citations to a like effect in Krüger *Römische Rechtsquellen*, sec. 6.

[3] D. 50, 17, 32; D. 1, 5, 24.

may be said to forbid a creditor from exacting payment of his debt twice over, because his debtor is unable to prove that he has already paid it. It forbids Shylock from claiming his pound of flesh, even though a Court would be bound to give judgment in his favour. A man is not to take unfair advantage even of his legal rights. He must act fairly and honestly with all men, and follow the maxim, *Quod tibi fieri non vis, alteri ne feceris.* The most elaborate study of the *jus naturale* as it was understood by the Romans, is by Voigt. From his analysis its characteristic features may be thus summarised.

(1.) It is capable of being applied to all men. It knows no distinction between slave and freeman.

(2.) It extends to all peoples. Before it the citizen and the alien are equal.

(3.) It is the same in every age. What is just to-day cannot be unjust to-morrow in identical circumstances.

(4.) It corresponds with the innate sense of right.

Section 4.—Natural Law and Practice.

From this conception of natural law Voigt says the jurists eventually came to recognise :—

(1.) The claims of natural relationship—of cognation—whereas the early lawyers considered only agnation. Thus, as we shall see later, the prætors, following the dictates of natural law, admitted emancipated children to share equally with their unemancipated brothers and sisters in the father's succession. Similarly, they ranked collateral kindred through females with those related through males, whereas by the old law an emancipated child or a relative on the mother's side was looked upon as an absolute stranger.

(2.) Through natural law the later lawyers came to feel the duty of faithfulness to engagements, even to engage-

ments not entered into with due regard to legal form. This led them to give effect to what they called natural obligations—viz., such as from some defect of form or from the position in which the parties stood to each other were unenforceable by the *jus civile*. They did not go the length of saying that a man might base an action on a natural obligation, but they said he might at least be allowed to found on a natural obligation as a defence against an unjust claim.

(3.) Natural law dictated that gains and losses should be apportioned according to equity. No man must be allowed to enrich himself unjustly.

(4.) In the interpretation of any declaration, oral or written, the guiding rule is to discover, if possible, the intention of the party. The judge is not to be bound to slavish adherence to the letter. He must get at the true mind of the party.

Two remarks may be made upon this[1] theory of natural law. Firstly, such generalisations are not without value, but when all is said they carry us only a very little way. Natural law is not a code of precise rules. It is merely an expression for that abstract justice which ought to be embodied in every rule of positive law. As Burke says, "All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of original justice."[2]

Section 5.—THE GOLDEN AGE.

But, after all, where there exists a rule of positive law which is applicable to the point in question, it is the duty of

[1] See Voigt, *Das Jus Naturale, &c., der Römer*, esp. vol. i. 52–64, 89–96; and Muirhead, *Roman Law*, second edition, p. 279.

[2] Tracts on the Popery Laws, cap. iii. part i.; and see Lorimer, *Institutes of Law, passim*.

a judge to give effect to it, even though it may seem to him contrary to "natural law." To say "Let us burn our law-books and direct that every judge shall decide all cases by natural law" would be to introduce the rule not of ideal justice but of caprice.

And, secondly, it is a profound error to believe, with some philosophers, ancient and modern, that in his primitive state man followed the dictates of a pure conscience, and that natural law in the sense of ideal justice was the governing rule of society. On the contrary, nothing is more certain than that primitive man was immensely further away from natural law than we are to-day. If we want to find laws which are the embodiment of sound reason and equal justice, we must not look for them among savages. Even in matters of form, simplicity is not the mark of ancient but of modern law. Primitive man delights in cumbrous ceremonies and in blind devotion to traditional forms. With him the letter is everything, the spirit nothing.[1] No better evidence for this could be adduced than the history of the Roman law itself. In it we can trace without difficulty a continual advance towards equity and simplicity. The harshness and unreasonableness of the early law and its pedantic love of legal technicality gradually give place to a system so reasonable, so clear, so orderly, that all nations of the world reject their own laws and adopt the Roman.

Section 6.—The Philosophers.

It may freely be admitted that this tendency of the later law towards equity was largely due to the philosophical theory of an abstract and ideal justice, to which it was the duty of lawyers to bring the law into conformity. But the *jus naturale* as a separate source of law is very little insisted

[1] Much information as to the law and customs of primitive peoples is to be found in the work of A. H. Post, *Grundriss der Ethnologischen Jurisprudenz*.

upon in our texts. The reason why this threefold division into *jus naturale, civile, et gentium*, plays so small a part is that the distinction between the *jus naturale* and the *jus gentium* is of so little importance. The doctrines of the *jus naturale*, or, more correctly, its one essential doctrine that justice or equity is the ideal to be aimed at came to be incorporated in concrete cases by the prætor. And the body of equitable rules which grew up in this way was the *jus gentium*. So far as the natural precepts of equity seemed capable of being reduced to positive laws, this was done in the *jus gentium*. The jurists therefore found it sufficient to make a twofold instead of a threefold division, and to say that every rule of law belonged either to the *jus gentium* or to the *jus civile*.

The history of the growth of the theory of natural law in modern Europe is very interesting, but lies outside the scheme of this little book.[1]

[1] An acute and valuable criticism is given in a recent work, *Natural Rights*, by Mr. D. G. Ritchie (London and New York, 1895).

CHAPTER XXXII.

THE *JUS GENTIUM*.

Section 1.—DEFINITION.

THE definition given of the *jus gentium* in the Institutes is not much more satisfactory than that of the *jus naturale*. The text-writers are often weakest in their philosophical, or would-be philosophical statements. It is said to be that law *quod naturalis ratio inter omnes homines constituit, id apud omnes populos per aeque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur.*[1] This is borrowed from Gaius. He says that in every country the law consists of two branches, one the special local law peculiar to the country, and the other the universal law which is the same everywhere. It assumes :—

(1.) That certain institutions or rules of law are found to be identical everywhere.

(2.) That they are so identical because based on *naturalis ratio*, by which is meant that they accord with their true nature, or are in harmony with the order of the universe, that they are κατὰ φύσιν as the Stoics said.

Gaius is here identifying the *jus gentium* with the *jus naturale*, which, as we have seen, is not consistent with the views of other jurists.[2] But a more serious fault of the

[1] Gaius, *Inst.* i. 1, *cf.* on *Jus Gentium*, Mommsen, *Staatsrecht*, iii. 590 *seq.*

[2] See Kruger, *Römische Rechtsquellen*, sec. 17 ; Muirhead, second edition, p. 283.

definition is that firstly, as a matter of fact, such identity of principles among all nations could not be established, and certainly had not been established by the Romans, and secondly, as is pointed out immediately afterwards, some of those institutions which are the most universal—*e.g.*, slavery —are not according to nature.

Section 2.—ITS ORIGIN.

A reader of the definition might suppose that what was meant by the *jus gentium* was a series of doctrines of law which observation had shown to be practised throughout the civilised world. This, however, would be completely misleading. Gaius writes as if the *jus gentium* had been arrived at by a conscious selection. The philosophic Roman had surveyed the world from Persia to Britain, and had found certain laws everywhere the same, while each country had in addition certain customs peculiar to itself. Those which were everywhere the same he called the *jus gentium.* Theophilus gives these examples. Everywhere we find contracts of sale, lease, deposit, partnership, loan. We find donations and wills. By the *jus gentium* murderers are put to death, and thieves are fined because it is natural that the punishment should fit the crime—that people should be punished *eo genere quo deliquerunt.* By the *jus gentium* a debtor shows gratitude to one who comes to his help when he is in straits for money. By the *jus gentium* a slave ought to obey his master, unless the master orders him to do something unlawful. Nothing, however, is more certain than that the *jus gentium* did not originate in this way.

As a matter of fact the *jus gentium* was not introduced as a result of any study of comparative jurisprudence. It grew up slowly and unconsciously, bit by bit, and it existed long before lawyers had taken to philosophising about the law.

Section 3.—Foreigners' Law.

The classical jurists, who wrote in a philosophical age, perceived upon a survey of the Roman law that it was made up of two separate elements. Certain parts of it—*e.g.*, the *patria potestas*—the rules as to the powers of the head of the family—or *mancipatio*—the form of conveyance of real property—were extremely ancient, belonged to the primitive law of Rome, and had always been confined strictly to Roman citizens. It was Roman law *par excellence*—the law of the Romans only. This they called the *jus civile*. A *mancipatio* was null if one of the parties, or even if one of the witnesses was an alien. An alien cannot be a *pater-familias* in the Roman sense. The rules applying to this branch of the law were rigid and formal. They perceived, on the other hand, that there was another element, including—*e.g.*, the law of sale of moveables, and the law of partnership, in which there was no such formality. Here the rules were free and equitable, and the minimum of form was prescribed. And this branch of the law clearly did not belong to the primitive stock. It had been grafted upon it at a later date. It was applicable not to Romans only, but to foreigners at Rome. This part of the law the jurists called the *jus gentium*. Every man—*i.e.*, according to ancient ideas, every free man, be he Roman or be he foreigner, can be the subject of the *jus gentium*. Everything which is capable of being held in private property, every *res in commercio*, can be its object. In the *jus civile* the form is everything. It matters not however clearly the parties may have shown their intention, if they have not clothed it in the strict forms prescribed by law, there is nothing which the Courts can recognise.

In the *jus gentium* the intention is everything, the form unimportant. For the *jus civile* it is essential that the Latin language should be employed. For the *jus gentium*

any language is equally good if it is understood by the parties.

Section 4.—VICTORY OF *JUS GENTIUM.*

The history of the Roman law is to a large extent the history of the gradual invasion of the *jus civile* by the *jus gentium.* It owed its origin to the growth of foreign trade at Rome. The prætorian edicts, and especially the edict of the *praetor peregrinus*, formed the vehicle by which it was introduced. Its development was aided by the spread of philosophical culture, and the consequent decline of the exclusive sentiment which at first prevented the Romans from admitting that a foreigner could claim to be heard before a Roman tribunal, or that the Romans could have any laws in common with foreign nations.

The dawn of the *jus gentium* is found in the treaties with their Italian allies, by which the latter were admitted to share to a limited extent in the Roman law. These favoured nations received by treaty grants of *commercium* and *recuperatio.* This meant that they could enter into contract according to the forms of the *jus civile.* Commercial treaties were made with important trading communities such as Carthage and Massilia. The treaties frequently declared that questions arising as to contracts entered into in virtue of them were to be decided not by the ordinary Roman tribunals, but by *recuperatores.* A question between two Carthaginian merchants at Rome,[1] or between a Roman and a Carthaginian was probably decided by *recuperatores.* They were a kind of special juries. It has been suggested that they consisted partly of Roman citizens and partly of citizens of the foreign country to which one or both of the parties belonged. But it is more probable that the *recuperatores* were all Romans.[2] But as Rome became

[1] Liv. 43, 3.

[2] Puchta, *Institutionen*, 1, sec. 83.

more and more a great commercial centre, numbers of traders began to flock thither who did not belong to any nation which enjoyed such treaty-rights. It was against the interests of the citizens, as well as of the foreign merchants, to prevent them from dealing with each other.

Section 5.—METHOD OF PRÆTOR.

This influx of foreigners led, about B.C. 242, to the appointment of a special prætor to act as judge in questions between two foreigners or a Roman and a foreigner.[1] He was, as I have said, called the *prætor peregrinus*, or foreign prætor. What law was he to administer? The peregrins could not be parties to the forms of the *jus civile*, so that was out of the question. It would hardly have occurred to a lawyer of that period to collect statistics as to the laws of other countries, and to select from them those which seemed the most suitable. What he did, when a case occurred, was to ask himself not if the forms of the *jus civile* had been complied with, but if their spirit had been satisfied. *E.g.*, by the *jus civile* one could not sell real property, or beasts of draught or burden without going through a curious and ancient ceremony called *mancipatio*, before five witnesses. If a peregrin sold his horse to a Roman, *mancipatio* was impossible. But the prætor held that there was a valid sale, if there had been an intention on the part of the owner of the horse to deliver it to the other for a certain price which the latter bound himself to pay. There had not been *mancipatio*, but there had been something which in the circumstances ought to be treated as equivalent. In some such way as this the prætor came to examine the institutions and doctrines of the *jus civile* itself, and to see how they might be stripped of their formality and be made applicable to foreigners. It is not to be supposed that any considerable

[1] D. 1, 2, 2, 28, Pomponius.

mass of new law was at one stroke thus introduced. It grew up bit by bit as the occasion presented itself. At the time when the peregrin prætor was appointed, Rome was becoming a great power. Italy had been conquered, and foreign conquests had begun. The Romans were beginning to notice the laws of other countries. They were beginning to be conscious of the extreme technicality of the *jus civile*. In his work of simplification the prætor was encouraged by finding that other nations, and especially the Greeks, who traded in the Mediterranean, had devised forms of contracts simpler than the cumbrous ceremonies of *mancipatio* and *in jure cessio*, and that these simple forms had been found to answer every actual need. Here and there he introduced bodily a foreign bit of law—*e.g.*, the *lex Rhodia de Jactu*, concerning jettison of goods to save a struggling ship; or the law of hypothec where the Greek name betrays the origin of the law. But such a case was quite exceptional. More often he did not take the Greek law, but he modified the Roman law in the Greek spirit of equity as opposed to formality.[1] But, broadly speaking, the *jus gentium* was home-grown law worked out at Rome by Roman magistrates. It is, in fact, a vexed question if it had not made considerable progress before there was any noticeable influx of foreigners. Karlowa (i. 454) thinks it grew up out of the needs of Roman citizens themselves. The old forms were found too cumbrous, and the prætor simplified them. Later on, when foreign trade arose, these prætorian rules were found to be well adapted for doing justice between a Roman and foreigner, or two foreigners. His view is that the *jus gentium* was a system of Roman equity which at a later stage of the history was extended to foreigners. The generally accepted view is that it was primarily introduced in consequence of the foreign trade—it

[1] *Cf.* Gide, *Condition Privée de la Femme*, p. 124 with Bruns, sec. 19.

was "peregrin-law," which at a later stage was applied between citizens themselves. Cuq (i. 490) supports the view of Karlowa. Among recent writers Ferrini inclines to the traditional opinion (Storia della Fonti, 18).

Section 6.—JURISTS IMPROVE *JUS GENTIUM.*

Once in operation its advantages were obvious, and after the edict had become stereotyped by the Julian compilation, the jurists of the classical period improved and developed the *jus gentium.* In their time the Stoic philosophy had leavened the thought of the educated Roman world. The lawyers were all on the look-out for principles which seemed to flow from natural reason, and to square with the eternal fitness of things. The *jus civile,* of which the old lawyers of the Republic had been so proud, seemed to the new class of philosophical jurists to be narrow, formal, and bigoted. They wanted to find doctrines applicable not to the citizens of Rome, but to the citizens of the world, and in their hands it was that the *jus gentium* was moulded into the shape which made it of permanent value.

The *jus gentium* consisted first almost entirely of commercial law. It was practically the law of contract and the law of personal property. Justinian says, sale, lease, partnership, loan, deposit—*omnes pœne contractus*—belong to it. This part was the most necessary and was the earliest to grow up. Some modern writers of high authority confine the term *jus gentium* to these branches of law.[1]

Section 7.—*LEX MERCATORIA.*

It was in fact the Roman law-merchant, and presents in its history and character a close analogy with the *lex mercatoria* of our day. In the Preface to Bell's *Commentaries on the Law of Scotland*—a work of the highest

[1] Bruns, sec. 19.

authority in that country—the learned author says (p. 11): "The law-merchant is universal. It is a part of the law of nations grounded upon the principles of natural equity as regulating the transactions of men who reside in different countries and carry on the intercourse of nations independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of Courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle; not making the law but handing it down, not to be quoted as precedents or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence." It would not be easy to find a better description of the Roman *jus gentium* than Mr. Bell's explanation of the law-merchant. And the *jus gentium*, like the law-merchant, must not be mistaken for a kind of international law. Both are part of the ordinary municipal law. A Canadian writer says, "We often speak of the *lex mercatoria* or law-merchant, as if there existed a body of rules of mercantile law governing all civilised states, whereas, in truth, each state has a mercantile law of its own; but all systems of mercantile law resemble each other very closely owing to their cosmopolitan origin."[1]

Section 8.—OTHER RULES OF *JUS GENTIUM*.

But as the *jus gentium*, in the sense of the law-merchant, was introduced by the prætor it is not unnatural that the same term should be applied to other new rules of the law which came in by the same means. *E.g.*, a marriage between a Roman and a peregrin was not *justæ nuptiæ*, because there was no *conubium* between the parties. The husband had no *patria potestas* over the children. Still it

[1] Lafleur, *Conflict of Laws*, p. 4.

was out of the question to treat as mere concubinage the permanent and honourable union of two foreigners at Rome, or of a foreigner and a Roman. The children were lawful though not *in potestate*. The father was bound to aliment them and so forth. So a marriage *juris gentium* came to be recognised side by side with a strictly Roman marriage.[1] So the prætorian changes in the law of succession are included by some writers in the *jus gentium*.[2] The passage already cited from Theophilus shows that the term was applied in this general sense by ancient writers.

We must be careful to remember that *jus gentium* does not mean international law. It has nothing to do with the law, positive or ideal, which is to be applied in regulating the differences between independent states. In the seventeenth century, it is true, *jus gentium* was commonly used in this sense. Grotius and the other founders of international law who were seeking for a philosophical basis upon which to rest their theories found the *jus gentium* a convenient term. The rules of humanity and justice which they were anxious to introduce in the relations of states were supported partly by the practice of the more civilised nations and partly by an appeal to the natural sense of right. These rules fell well enough under Gaius' definition of *jus gentium* as *quod naturalis ratio inter omnes homines constituit*. But Gaius and Grotius were thinking of quite different things.

[1] Muirhead, second edition, p. 227.

[2] Moyle, Introd. 40.

CHAPTER XXXIII.

THE *JUS CIVILE.*

Section 1.—CITIZENS' LAWS.

THE *jus civile*, or, more fully, the *jus civile Romanorum*, was the special local law which was confined to Roman citizens. It was their particular heritage and foreigners were jealously excluded from it. It is constantly used in antithesis to the *jus gentium* or the *jus prætorium*. Papinian in a well-known passage (Dig. 1, 1, 7, 1) says, *jus civile* is all the Roman law made by the legislative assemblies, by the emperors, and by the jurists, as opposed to the *jus prætorium* which the prætors had made. It has not the same sense therefore as the "civil law" in the mouth of a Frenchman, because in that term there is no thought of distinguishing the citizen from the foreigner. The "civil law" of France means merely the private law of the country applicable to everybody within its borders — citizen or foreigner. In the Roman sense the *jus civile* was the civil law for the Romans and for the Romans only.

Section 2.—LOCAL PECULIARITIES.

Each state has its own *jus civile* peculiar to itself, based on its own history and applicable to its own special requirements. We do not expect to find here the universality characteristic of the *jus gentium* or the *jus naturale*. Mercantile laws have to be much the same among the countries which carry on trade with each other or commerce

would be restricted. Human nature is much the same everywhere, and certain broad principles of equity are likely to be recognised by all civilised states. But outside these there is a field within which diversity and not similarity is to be looked for. Theophilus gives some illustrations.[1]

Athens, like England, could not support her own population, and depended largely on imported corn. It was therefore advisable for Athens to have free trade in corn, and this was part of the Athenian *jus civile*. But Egypt was a great corn-producing country, and it would, according to Theophilus, have been as ridiculous for Alexandria to have free trade in corn as it was politic for Athens.

Sparta, like China, hated foreigners, and believed that their presence in the country was likely to corrupt the state. Sparta had therefore a law—the ξενηλασία, under which foreigners were expelled from her territory when it seemed to the Government desirable to do so. (See Thuc. 1, 144.)

Athens, on the other hand, like England, believed in the 'open door" to immigrants. Rome started with a very special *jus civile* in this sense. But the peculiar and unparalleled success of the Roman law was due not to this *jus civile* but to its abandonment. The peculiar *jus civile* of Rome, based on the Twelve Tables, and on their extension by the interpretation put upon them by the Jurists, was as time went on transmuted bit by bit by the new doctrines of the *jus gentium*. Its restriction to *cives* became of less and less importance as the citizenship was extended. The Emperor Caracalla (*circa* 212 A.D.) made all the free subjects of the empire Roman citizens.[2] By that time all the civilised world was under the Roman sway, so that the *jus civile* instead of being the law of a small body of privileged inhabitants of a little town in Italy, had become the law of the world. And, as we have seen, its content had changed

[1] I. 1, 2, 11.

[2] D. 1, 5, 17.

as much as its extent. The continual inroads of the *jus gentium* had left hardly anything intact of the primitive *jus civile.*

Section 3.—*Jus Scriptum*—*Jus non Scriptum.*

All the law, whether public or private, and whether belonging to the *jus civile* or the *jus gentium*, is either written law or unwritten law.

By written law is meant law which is formulated in a precise shape and at a particular point of time by some body or person having authority to make law.

Unwritten law is the law which rests upon custom, which has grown up unconsciously, and the introduction of which cannot be referred to a definite moment. Customary law does not become written by being put in writing. It must be put in writing by a particular authority. It must be enacted as a statute, though at Rome this did not necessarily mean by a legislative assembly. But it must be done by someone authorised to make it written law, by one or other of the recognised law-givers, or *νομοθέται*, as Theophilus calls them.[1] Written law must be written by the state, not by an individual.

[1] Theoph. 1, 1, 4.

CHAPTER XXXIV.

The Seven Sources of the Law.

Section 1.—Enumeration.

There are, according to Justinian, seven sources of the Roman law—*i.e.*, seven ways in which, at one time or another, laws had been made at Rome. The written law was the work of one or other of no less than six authorities who, at various periods in the long history of the state had possessed the power to legislate.

The unwritten law springs from one source—viz., custom.

The written law, he says, consists of *leges*, *plebiscita*, *senatus-consulta*, *principum placita*, *magistratuum edicta*, and *responsa prudentium*.

Section 2.—External and Internal History.

The description of these sources of the law, or, in other words an account of the legislative machinery of Rome at various epochs, is called by the modern writers the external history of the law. It is, in fact, a part of the constitutional law. Opposed to it is the internal history; that is to say, an account of the growth of the particular legal institutions and doctrines. *E.g.*, the explanation of the powers of the Senate or of the Prætor belongs to the external history, while the explanation of the doctrine of *patria potestas*, and the modifications which it underwent belongs to the internal history.

I have already spoken of the six sources of the written law. It remains to explain the source of the unwritten law.

Section 3.—Custom as a Source of Law.

Ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.[1]

Among the Greeks, Justinian says that the Lacedæmonians had little written law, whereas most of the Athenian law was written. He makes the puerile remark on this that customary law seems to have its origin at Sparta, and written law at Athens. Justinian rests the authority of all law upon the consent of the people. It binds them because they have agreed to be bound by it. There are different modes in which this consent is declared. The people may meet in one of the regularly constituted assemblies, and there pass a law. The magistrates, and certain of the lawyers, may make laws subject to particular restrictions. And the emperor, the highest magistrate of all, may make laws. But the legislative power of these officials is derived from the people. Their authority to legislate has been conferred upon them. It is analogous to the legislative power of our members of Parliament. As a matter of fact the emperor was a despot. But in theory he enjoyed his unlimited power because it had been conferred upon him by the people. In all these various ways there may be an express act of legislation. But besides these there may be, so to speak, a tacit act of legislation. The people may make laws, not only by enacting a statute themselves or by permitting some representative to enact a statute for them, but also by accepting a custom. By following a custom they as clearly show their consent that it should be law as if they had expressly enacted it.

[1] I. 1, 2, 9.

Quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis?[1]

This is a good enough reason why custom should be binding. But it must be understood that much of the customary law goes back to a remote antiquity. At an earlier period the customs observed by a particular people were believed to derive their validity not from the consent of the people, but from the will of the gods. In primitive societies in which writing is unknown, the old men are the guardians of the customs. Doubtful questions are referred to them. They trust to memory. Often the chief rules of custom are enshrined in proverbs. *E.g.*. an African tribe—the Bogos—say "Woman is a Hyena"—meaning that she has no legal rights.[2]

Section 4.—PRIMITIVE CUSTOMS.

The Romans clearly perceived that a custom could not be considered as binding unless it had been sanctioned by long and continuous observance. It must belong to the *mores majorum.* It must be a *diuturna consuetudo, inveterata consuetudo, per annos plurimos observata.* In fact the origin of most customary law is lost in antiquity. And customary law in the Roman sense plays a much slighter part in the development of the law in historical times. But some important rules seem to have been introduced by custom even during the Republic, as—*e.g.*, the prohibition of donations between husband and wife.[3]

There is no doubt that in early times custom is the main fountain of law. The fundamental institutions of the family, the main rules as to the rights personal and patrimonial of the husband and the wife, the main rules as to the rights of

[1] D. 1, 3, 32; Gell. v. 13; D. 1, 3, 33, Ulpian; D. 1, 3, 32, Julian; D. 1, 3, 35, Hermogenian.

[2] Post, *Grundriss der Ethnologischen Jurisprudenz*, Vol. i. p. 11.

[3] D. 24, 1, 1.; see Karlowa, i. 450.

the children, are in most countries part of the traditions of the race. So it was with the Romans, so it was also with the Germans. Very often the early legislation does not consist in the making of new law, but in drawing up in precise language and formally enacting what has been the law from time immemorial. The Twelve Tables—the early Roman Code—was mainly of this declaratory character.[1] And they do not need to declare all the law. Much of it is so familiar that no one disputes it. This is one reason why such early codes can be so short. They take a great deal for granted. In France, in the fifteenth and sixteenth centuries, two thousand years later, we see the same process going on in the "*redaction*" of the *Coutumes*. The *Coutume de Paris* does not, for example, make the rules as to the community of property between the consorts. It merely declares again a Frankish custom of immemorial antiquity.

Section 5.—How Custom Becomes Law.

The exact way in which custom becomes law has been much disputed. The old view was that people acted for generations in a particular way, until gradually the practice became so settled that to depart from it shocked the sense of the community and was treated as unlawful. By a slow process, and unconsciously, the custom hardens into law. Savigny, whom many jurists follow, maintains that the custom springs from the national consciousness, and is its outward sign. The reason a uniform practice is followed, is that it corresponds with the national view of right (*Rechtsgefühl* or *Rechtsbewusztseyn*). The principle precedes the practice.[2]

[1] Karlowa, i. 113 ; Maine, A.L. 17.

[2] System, Vol. i. pp. 34, *seq.*; See Holland, *Jurisprudence*, ch. v. ; Maine, *Early History of Institutions*, chs. xii. and xiii. ; Karlowa, i. 450 ; Moyle, *Inst.*, p. 109 ; Jenks, *Law and Politics in Middle Ages*, pp. 56, *seq.*

Section 6.—Custom as Interpreter of Statute.

There is, however, a second way in which custom is a source of law. This is when custom interprets statute. Statutes are frequently ambiguous. Two or more interpretations of a clause may be at first equally plausible. One of them may, however, by custom come to be firmly established as the right one. Paul[1] says *optima enim est legum interpres consuetudo.* Even a construction which is really unsound may nevertheless come in this way to be regarded as unassailable.

E.g., the Twelve Tables gave an intestate succession in default of *sui* to the agnates of the deceased. No distinction was made between male and female agnates. But the jurists interpreted the term agnates in the case of women to mean sisters only, and they declined to allow a female cousin, for example, to take a succession as an agnate, though a male cousin might do so. Justinian says this was never intended by the Twelve Tables,[2] but by custom it became a fixed rule that the provision should be construed in this sense.

Section 7.—Judicial Precedents.

Somewhat analogous to the authority of custom as interpreting an ambiguous enactment is the authority of previous decisions by the Courts upon a doubtful point. The Romans did not admit that previous decisions actually made law, though they cited such *præjudicia* or *exempla* as guides to the correct decision. So Justinian does not include *res judicatæ* among the sources of law.[3] Cicero in another enumeration of the sources of the law includes *res judicatæ.*[4] But his enumeration is not scientific, but popular. And

[1] D. 1, 3, 37. [2] I. 1, 2, 3. [3] Karlowa, i, 451.
[4] Cic. Top. v. ; see Moyle, p. 29 ; Bruns, sec. 29.

although prior decisions may have gone far to influence the Courts, it is not correct to treat them as having been under the Roman system, among the direct sources of law. Their rule was *Non exemplis sed legibus judicandum est.*[1]

Even a code does not altogether prevent the growth of customary law. The discussion of writers and the decisions of the Courts lead to certain rules being followed in preference to others. It is by a kind of custom that we have a settled "*jurisprudence.*" And there are still a considerable number of cases in which under most codes the judge is bound to take account of local usages or customs.

Section 8.—Custom as Abrogating Law.

As custom can make law, so it can unmake it. This is an easy doctrine when we consider merely the question whether an old custom can pass away, or be superseded by a newer custom. Here the affirmative is clear. The only sanction of the custom is that it shall be a custom which is in observance. A custom fallen into decay is a custom no longer.

But a much more difficult question is whether a statute can cease to be law because people cease to regard its provisions. We sometimes speak of an Act of Parliament as being a "dead-letter." But is it so much a dead-letter that the Courts will decline to enforce it? Can a statute be abrogated by desuetude? Upon this point the Institutes contain a clear statement that the tacit consent of the community is sufficient to abrogate even a statute.[2] And in the Digest there is a still more explicit opinion in the same sense by Julian. "What difference," he asks, "does it make whether the sovereign people declare their will by votes or by acts? Wherefore it has, most properly, been admitted that laws should be abrogated by disuse, by the

[1] C. 7, 45, 13.

[2] I. 1, 2, 11.

tacit consent of everybody, as well as by the express vote of the legislator."[1]

There is no doubt that during the greater part of the history this view was accepted as sound law. Many laws, statutory as well as customary, are said by the jurists to have fallen into desuetude. *E.g.*, Gaius says that the two early forms of wills—the *testamentum calatis comitiis*, and the *testamentum in procinctu*—have passed away by disuse —*in desuetudinem abierunt.*[2] And Ulpian says, speaking of the Lex Aquilia—the great statute dealing with reparation for injuries—that the second chapter of that law has passed into desuetude.[3] Against this there is a constitution of the Emperor Constantine (319 A.D.) which seems to lay down as a general statement that custom cannot overrule statute.[4] Various attempts have been made to reconcile this passage with the passages cited from the Institutes and the Digest. According to one view, Constantine means that a general law can only be abrogated by a general custom to the contrary. The law of a country cannot be abrogated by a contrary custom of a particular town in that country.[5]

According to another view, Constantine means that custom cannot abrogate a statute if the statute itself contains a provision to the contrary. But it is hard to see why such a declaration should have any greater efficacy than the rest of the enactment.[6] The utmost weight that it would be reasonable to give to such a declaration would be to hold that in this case mere custom would not be sufficient. There must be a custom resting on the conviction that the statute is no longer in force.[7] It seems to me best to recognise frankly

[1] *Nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur* (D. 1, 3, 32, 1).

[2] G. 2, 103.

[3] D. 9, 2, 27, 4.

[4] C. 8, 52, 2.

[5] Puchta, *Inst.* i. sec. 20.

[6] See, however, Moyle, *Inst.*, second edition, p. 111.

[7] See Windscheid, *Pandekten*, eighth edition, i. sec. 18, note 3.

that there is an antinomy. The passages are not reconcilable without doing violence to the texts. Possibly the law of Constantine was intended to revoke the law laid down in the Digest, and the compilers of the Institutes overlooked the change.[1]

Section 9.—The Modern Law.

This difference of view as to the force of custom in abrogating a law, even though it be a law made by statute, is one which has repeated itself in modern systems of law. In Germany it has long been a disputed question. The weight of authority seems now to be in favour of allowing a statute to be abrogated by desuetude.[2] The Scotch law has long been settled in the same sense. Lord Stair says, "In this we differ from the English, whose statutes of parliament of whatsoever antiquity remain ever in force till they be repealed; which occasions to them many sad debates (public and private) upon old forgotten statutes."[3]

In England, on the other hand, a statute is law until repealed by another statute.[4] And this is now the prevailing opinion in the modern French law.[5]

[1] See Dernburg, *Pandekten*, i. sec. 28; Accarias, *Précis de Droit Romain*, fourth edition, i. 23.

[2] Windscheid, *Pandekten*, eighth edition, i. sec. 18, where there is a full note on the literature.

[3] Stair, *Institutions*, i. 1, 16.

[4] Blackstone, *Com.* i. 77; Dwarris on *Statutes*, p. 530.

[5] Huc, *Commentaire du Code Civil*, Vol. i. sec. 49; Aubry et Rau, *Cours de Droit Civil*, fifth edition, Vol. i. sec. 29, and authorities there cited.

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